

Interest Group Mediation: A Mechanism for Controlling and Improving Congressional Lobbying Practices

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I. INTRODUCTION

The complexities of modern society increase the amount of necessary government actions and decrease the amount of deliberation that goes into them. The resulting strain on our policymaking system leads government officials to rely on lobbyists and leads lobbyists to fight viciously for influence over government officials. Symptoms of this problem surface with scandals like the Abramoff¹ affair and trends such as the recent lobbying boom. These instances of corruption and inefficiency in congressional practices have renewed interest in lobbying reform. While lobbyists provide legislatures with benefits such as information and representation of special interests, lobbying often becomes a spending war between conflicting interests that consumes the efforts of both legislators and advocacy groups. Currently, the only limitations on lobbying practices are disclosure laws that require lobbyists to reveal their lobbying activities after spending a certain amount influencing officials.

Mediation may offer an adaptable and widely beneficial enforcement mechanism for lobbying reform. If Congress had the power to push opposing interest groups to enter mediation before spending a certain amount in lobbying on an issue, they may be able to preclude costly, indirect fighting by reaching consensus over policy action. Opening and facilitating communication among interests may help to improve legislation and reduce the corruption that is associated with interest group pressure. This process, which I will call "interest group mediation," would combine existing lobbying practices with two simple legislative mechanisms to decrease malignant lobbyist activity and improve the quality of public policy. Aside from solving problems, interest group mediation offers a model for the optimal use of lobbyists in congressional practice and points to broader

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¹ Meredith McGehee, *Lobby Reform as Window Dressing*, 31 ADMIN. & REG. L. NEWS 4, 4 (2006).

implications of increasing the democratic value of government institutions to better fit modern conditions.

Part II of this Note describes the lobbying boom and its negative consequences. Part III presents the basic idea of interest group mediation as the solution to the inefficiency and corruption involved with current lobbying practices. Part IV describes existing governmental structures that use mediation in creating consensual public policy such as negotiated rulemaking and public dispute resolution. Part V explains the mechanisms Congress will need to create in order to implement this process. Finally, Part VI draws broader conclusions on optimal lobbying practices and on using interest group mediation to improve the democratic value of legislative enactments.

II. THE PROBLEM: CORRUPTION AND INEFFICIENCY IN CURRENT LOBBYING PRACTICES

A. *The Lobbying Boom*

The uncontrolled growth of the lobbying industry is the most important recent development in how the federal government is run. These practices "exploded"² in the last decade and the resulting lobbying pressure on U.S. policymakers is at an all-time high.³ The number of registered lobbyists in Washington more than doubled between 2000 and 2005,⁴ and through these agents, interest groups and corporations⁵ spend \$2 billion every year influencing Congress.⁶ These groups consider indirect influence to be a necessary and even beneficial cost.⁷ In fact, many consider lobbying to be a

² Ken Silverstein & Jess Taylor, *Profiting through Influence: The Pharmaceuticals and Lobbying Industries*, in IT'S LEGAL BUT IT AIN'T RIGHT 253, 266 (Nikos Passas & Neva Goodwin eds., 2007) (There are an estimated 40,000–80,000 lobbyists in Washington, D.C., which is "a minimum of seventy-five for every member of Congress.").

³ Brody Mullins, *U.S. Lobbying Tab Hits a Record*, WALL ST. J., Feb. 14, 2006, at A6 ("U.S. corporations and interest groups spent a total of \$1.16 billion to lobby Washington in the first half of 2005, setting a record.").

⁴ Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street: Lobbying Firms Hire More, Pay More, Charge More to Influence Government*, WASH. POST, June 22, 2005, at A01.

⁵ Mullins, *supra* note 3.

⁶ Peter Katel, *Lobbying Boom*, CQ RESEARCHER (July 2005).

⁷ Birnbaum, *supra* note 4 (stating that such lobbying expenditures are the "cost of doing business in the federal environment"); see also Don Feder, *Lobbying Is a Cost of*

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better investment than campaign contributions,⁸ and one Washington firm disclosed that its clients can expect to receive one hundred dollars in tangible benefits for every dollar spent on lobbying.⁹

The main reason that this industry is so profitable is that government is expanding.¹⁰ A growth in government creates incentives to use lobbyists to seek opportunities as they arise, monitor legislative activity, and protect acquired benefits. First, expansion causes active rent-seeking¹¹ because the proliferation of newly-created structures and policies are "government goodies" that offer influence and control to corporations and interests.¹² Because there are increased opportunities in doing business with Washington,¹³ businesses become more aggressive, creating a feeding frenzy for influence.¹⁴ Next, the increased activity in Congress creates a need for lobbyists to merely monitor the legislature.¹⁵ Though lobbying implies cajoling and bribing, most of the practice currently involves gathering information¹⁶ to apprise clients of what regulators are doing.¹⁷ Finally, this growth creates an incentive for lobbying as a protectionist measure—benefits that are obtained by one interest group are quickly overwhelmed and negated by advantages given to others.¹⁸ Many players in Washington advise

Doing Business in Washington — report on money spent lobbying members of Congress, INSIGHT ON THE NEWS, Dec. 18, 2000.

⁸ Silverstein & Taylor, *supra* note 2, at 264.

⁹ See Radnor Inc., <http://www.radnor-inc.com/lobbying.htm> (last visited Feb. 13, 2007) (Radnor Inc. is a "legislative relations and political consulting firm based in Washington, D.C.").

¹⁰ See Birnbaum, *supra* note 4 (attributing the "lobbying boom" initially to "rapid growth in government"); see also Don Feder, *In age of big government, lobbyists meet a pressing need*, JEWISH WORLD REV., Nov. 20, 2000 ("An increase in government creates more of a demand for defensive lobbying and PAC contributions.").

¹¹ Kenneth G. Elzinga, *Antitrust Policy and Trade Policy: An Economist's Perspective*, 56 ANTITRUST L.J. 439 (1987) ("A crude definition of rent-seeking is using the power of the state to increase one person's wealth at the expense of another's.").

¹² Birnbaum, *supra* note 4.

¹³ *Id.* ("Washington has become a profit center.").

¹⁴ Silverstein & Taylor, *supra* note 2, at 266.

¹⁵ Birnbaum, *supra* note 4.

¹⁶ EDWARD V. SCHNEIER & BERTRAM GROSS, CONGRESS TODAY 149 (1993) (citing studies showing that business lobbyists "spend more time communicating with their own members than they do lobbying," indicating that gathering information is a greater focus than is influencing policy).

¹⁷ Birnbaum, *supra* note 4.

¹⁸ Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 316 (1993).

continued lobbying protection after obtaining benefits, warning that "[a]s government grows, unless you're right there to limit it, it can intrude in just about any industry."¹⁹ As a result, when they need benefits, protection, or just information, organizations that deal with Congress have no choice but to hire lobbyists.²⁰ Furthermore, this growth in government may not be a temporary phenomenon, but rather the natural effect of an increasingly complicated society.²¹ Therefore, as America continues to become more complex, lobbying pressure may further intensify.

B. *Negative Effects of Unrestricted Lobbying*

Though extensive lobbying practices create benefits for some,²² this influence-peddling has substantial negative externalities.²³ The permanent presence of lobbyists in Washington that use cultivated relationships with officials to sway public policy is unfair and highly suspect.²⁴ Furthermore, interest groups that attempt to outspend each other on indirect influence are engaging in a risky and inefficient practice.²⁵

Though our representative system values direct citizen input,²⁶ the use of permanent, organized lobbying was not part of the intended design²⁷ and is a

¹⁹ Bimbaum, *supra* note 4 (quoting Robert L. Livingston, a Republican former chairman of the House Appropriations Committee, currently president of a lobbying firm).

²⁰ *Id.* ("[W]hether it is to protect themselves against harm or to win more benefits, executives and insiders say they have no choice but to hire lobbyists.").

²¹ Congressman Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 326 (1994) ("As America grew, the problems facing it became more complex, and the House's workload increased.").

²² See *infra* Part VI.A. (discussing the key benefits of lobbying and how interest group mediation preserved them).

²³ Silverstein & Taylor, *supra* note 2, at 255.

²⁴ LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 37–38, 56–57 (1987).

²⁵ Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1181 n.53 (2006) ("[I]n negotiations between legislators and lobbyists, long-term legislation or 'deals' between the parties hold higher value because they reduce transaction costs and risks.").

²⁶ SUSSKIND & CRUIKSHANK, *supra* note 24, at 56 ("Lobbying is a means for voters to supplement their electoral intentions and to express the intensity of their concerns in a manner not presented for a yes-or-no vote.").

²⁷ *Id.* at 37 (The "founding fathers never anticipated a permanent cadre of lobbyists.").

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cause of distrust of congressional practices.²⁸ Because lobbyists often advocate policy choices to public officials with whom they have preexisting relationships instead of advocating with merit and substance,²⁹ the results may be unfair,³⁰ and even the appearance of undue influence creates cynicism and friction from potential losers.³¹ Further exacerbating this problem, the recent "gold rush"³² to create and protect benefits through lobbying intensifies the corruption between legislators and lobbyists. With incentives leading lobbying interests to fight viciously for influence, legislators are tempted with lavish gifts and contributions that lobbyists are willing to provide.³³ Pressures on competing interests, therefore, lead to lobbying pressure on officials, through relationships that are so cozy that they are potentially illegal.³⁴ Under these close relationships, legislators distribute government benefits through unethical "backstage dealings" and earmark appropriations.³⁵ These practices are growing out of control³⁶ and distracting lawmakers from their core duties.³⁷ Thus, the unrestrained lobbying practices in Congress have led to corrupt dealings that hinder legislators from acting in the best interests of the country.

Another problem with the lobbying boom is the inefficient practice of defensive lobbying. Defensive lobbying is "lobbying aimed at avoiding the

²⁸ *Id.* at 38 (noting that while we promote private citizens expressing concerns to their representatives, we distrust permanent, highly-organized legislative lobbyists of special interests).

²⁹ *Id.* at 57.

³⁰ *Id.* at 56.

³¹ *Id.* at 57.

³² Birnbaum, *supra* note 4.

³³ For example, Rep. Randy "Duke" Cunningham (R-Cal.) received a "Rolls-Royce, a yacht, and a 19th-century Louis-Philippe commode." Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST, November 29, 2005, at A01. In another example, Ohio Republican Robert W. Ney admitted to receiving "'a stream of things of value,' including the golf trip, from [Jack] Abramoff in exchange for political favors." Norman Ornstein, *Argument, A Watchdog that Didn't Bark: Jack Abramoff's guilty plea has made corrupt lobbying a very big story. Where were the media when coverage might have curbed the sleaze?*, LEGAL AFF. 18, 19 (Mar.-Apr. 2006).

³⁴ Babcock & Weisman, *supra* note 33, at A01.

³⁵ Jonathan Weisman & Charles R. Babcock, *K Street's New Ways Spawn More Pork: As Barriers With Lawmakers Fall, 'Earmarks' Grow*, WASH. POST, January 27, 2006, at A01 ("These relationships have coincided with the rapid growth in the volume of home-state pork-barrel projects, commonly called earmarks.").

³⁶ *Id.* (quoting Sen. John McCain (R-Ariz.)).

³⁷ *Id.* (quoting Scott Lilly, who recently retired as chief Democratic aide on the House Appropriations Committee).

harm that other peoples' lobbying and other rent-seeking actions are likely to cause."³⁸ As explained above, to secure benefits and prevent harm, industries spend millions of dollars³⁹ and much of their lobbying efforts⁴⁰ engaging in protectionist lobbying activities.⁴¹ While lobbying is arguably positive as a source of information for lawmakers⁴² and as a voice for affected interests,⁴³ money spent on defensive lobbying is "non-economic"⁴⁴ because it is spent to counteract lobbying expenditures from opposing interests.⁴⁵ When two groups aim their lobbying efforts at undermining one another's influence, the net effect is the same as if neither was spending money on lobbying at all, and the only thing that is created is obstruction of productivity in Washington. Defensive lobbying, therefore, expands the lobbying industry⁴⁶ and consumes efforts of legislators and petitioning interests in what is basically a spending race over indirect influence. Though businesses

³⁸ J. PATRICK GUNNING, UNDERSTANDING DEMOCRACY: AN INTRODUCTION TO PUBLIC CHOICE 349 (2003), available at http://nomadpress.com/public_choice/ud-16.pdf (last visited Mar. 5, 2008).

³⁹ Roger S. Ballentine, President, Green Strategies, Inc., Keynote Address, Building a Brighter Future for Coal by Building a Better Politics of Coal (Aug. 6, 2003), available at <http://www.greenstrategies.com/vision/CLEAN%20COAL/COAL-GEN%20SPEECH.htm> (last visited Feb. 15, 2007) (noting that the industry was "forced to spend millions of dollars on defensive lobbying efforts in Washington and at the state level").

⁴⁰ Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/posts/1160258785.shtml#148466> (Oct. 7, 2006) (last visited Feb. 15, 2007).

⁴¹ One lobbying firm lists such activities as "defeating harmful proposals, amending them to your favor, exempting the industry out of the proposal, [and] preempting efforts." Capitol Solutions, <http://www.capitol-solutions.com/cs/services.php#defensive> (last visited Mar. 5, 2008).

⁴² Christopher J.S. Termini, Note, *Return on Political Investment: The Puzzle of Ex Ante Investment in Articles 3 and 4 of the U.C.C.*, 92 VA. L. REV. 1023, 1038 (2006) ("Lobbyists facilitate this information processing by providing pertinent facts, rather than persuasive threats. In this light, lobbying as an information transmission process may be a necessary lubricant to effective lawmaking.").

⁴³ See SCHNEIER & GROSS, *supra* note 16, at 291.

⁴⁴ Ballentine, *supra* note 39.

⁴⁵ Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1106 (2002) ("[T]he redistributive lobbying by corporations as a class for the most part victimized other corporations.").

⁴⁶ GUNNING, *supra* note 38, at 349 ("The lobbying industry is even larger than otherwise because of what we might call *defensive lobbying*.").

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nevertheless engage in defensive lobbying because of the profitable return, this practice is inefficient and problematic.

C. Current Regulations

Regulating the corrupt and inefficient aspects of lobbying is not easy because of the constitutional difficulty of regulating political speech⁴⁷ and because it is difficult to regulate those aspects without hindering positive lobbying practices.⁴⁸ Because lobbying efforts provide lawmakers with citizens' viewpoints,⁴⁹ any attempt to reform these practices implicates the First Amendment right to petition the government.⁵⁰ The regulation of lobbying is therefore a balance between the constitutional right to petition and the practical need to fight undue influence from special interests.⁵¹ As a result, lobbying reform uses non-intrusive mechanisms such as registration for lobbyists and public disclosure of their lobbying expenditures.⁵²

Disclosure laws are based on the idea that public opinion would harness the interaction of interest groups and the government.⁵³ However, the public has not filled this role,⁵⁴ leaving disclosure laws ineffective.⁵⁵ As a result, the current mechanisms for monitoring and enforcing the nation's lobbying and

⁴⁷ WILLIAM V. LUNEBURG & THOMAS M. SUSMAN, *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LAW GOVERNING LAWYERS AND LOBBYISTS* 11 (2005).

⁴⁸ See *infra* Part VI.A (discussing the positive aspects of lobbying that must be preserved and unhindered by regulation).

⁴⁹ SUSSKIND & CRUIKSHANK, *supra* note 24, at 56 ("Lobbying is a means for voters to supplement their electoral intentions and to express the intensity of their concerns in a manner not presented for a yes-or-no vote.").

⁵⁰ Steven A. Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL RTS. J. 717, 717 (1995).

⁵¹ *Id.* (discussing the search for the "most desirable method of balancing individual liberties with the need for lobbying regulation").

⁵² LUNEBURG & SUSMAN, *supra* note 47, at 7.

⁵³ William P. Fuller, *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon*, 17 SETON HALL LEGIS. J. 419, 420 (1993).

⁵⁴ *Id.* (discussing the use of public oversight of lobbying activities and concluding that "these ideals have never been realized through the use of disclosure laws"); Craig Holman, *Disclosure is Fine, but Genuine Lobbying Reform Must Focus on Behavior*, 31 ADMIN. & REG. L. NEWS 5, 7 (2006). ("No matter how good the lobbying and ethics law may be—and not much is expected to emerge from this Congress—the law doesn't mean a thing if *no one is watching*."). (emphasis added).

⁵⁵ Fuller, *supra* note 53, at 419 ("Indeed, these enactments have been largely irrelevant and ineffectual.").

ethics laws are dismissed as "sheer folly."⁵⁶ Recent reform efforts offer little hope because they rely on continued use of these inherently weak methods.⁵⁷ Thus, "[d]isclosure is not enough"⁵⁸—the only way to affect current lobbying practices is to change the process.⁵⁹

Because the Constitution protects lobbyist activity and because disclosure laws are ineffective, new approaches are necessary in lobbying reform.⁶⁰ Currently, lobbying is so crucial to the inner workings of Congress⁶¹ and so critical to the fortunes of businesses and special interests⁶² that genuine reform must venture beyond the behavior of only lobbyists.⁶³ In order to preserve the necessary lobbyist functions while regulating corrupt and suspect practices in Congress, the focus is shifting to the interest groups and politicians that interact with the lobbyists.⁶⁴ The key would be structuring the interaction among these actors so that, in pursuing their

⁵⁶ Holman, *supra* note 54, at 6.

⁵⁷ McGehee, *supra* note 1, at 4 (describing current reform efforts in which "[i]ncreased disclosure of lobbyists' activities is a primary feature of both the House and Senate bills," describing these reforms as "weak legislation," and concluding that "[n]either bill sufficiently addresses the problems with the current system"); James M. Demarco, *Lobbying the Legislature in the Republic: Why Lobby Reform is Unimportant*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 599, 627 (1994) ("Laws increasing the amount of disclosure a lobbying group must offer border on the superfluous.").

⁵⁸ Holman, *supra* note 54, at 7.

⁵⁹ McGehee, *supra* note 1, at 5 ("The American public will know for sure when meaningful reform has taken place because they will see a change in the process.").

⁶⁰ Demarco, *supra* note 57, at 627 ("Laws restricting the amount of lobbying activities are unconstitutional.").

⁶¹ SCHNEIER & GROSS, *supra* note 16, at 292 (stating that Congress relies on the advice and information of others); *id.* at 300–01 (describing the place of lobbyists in the internal structure of Congress).

⁶² Holman, *supra* note 54, at 5 (The "business of lobbying has become so lucrative, and so critical to the fortunes of businesses and special interests, that genuine lobbying reform today must venture into the regulation of the *conduct* of lobbyists and the ethical *behavior* of members of Congress and their staff.").

⁶³ *Id.* See also Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 517 (2007) (suggesting an "interest-group-based approach to lobbying regulation").

⁶⁴ Krishnakumar, *supra* note 63, at 517 ("[T]he key to accomplishing such public-regarding reform is to focus not on lobbyists, as Congress has done for the past two centuries, but on the two entities between which lobbyists mediate: elected officials and interest groups.").

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separate self interests, they further public goals.⁶⁵ And because of First Amendment implications, the improved process must use a soft mechanism that controls corruption and inefficiency without hindering political speech.

III. THE SOLUTION: USING MEDIATION AS A PROCESS-BASED ENFORCEMENT MECHANISM

As a forum for facilitated negotiation, mediation has the potential to serve as a soft, process-based mechanism for guiding lobbying activities in productive directions. To add some substance to registration and disclosure laws,⁶⁶ Congress can compel interest groups and corporations that spend a certain amount in lobbying efforts to mediate with opposing interests. Interest group mediation may therefore serve as an enforcement mechanism⁶⁷ that can limit lobbying practices while facilitating political speech and productive action. This mechanism will empower interest groups, create collaborative public policies, and reduce lobbying pressures⁶⁸—once the interest groups reach negotiated consensus on a course of action, there is no need for conflicting lobbying between them. These benefits do not come with significant costs because the consensus-building supplements and does not supersede traditional practices. Interest group mediation would therefore create parallel adversarial and cooperative efforts—lobbyists and members of Congress acting under conventional methods while the affected interests

⁶⁵ *Id.* (stating that it is most efficient to structure lobbying regulations in a way that makes it likely that, as these interests act to maximize their own best interests, they also will further public goals).

⁶⁶ Lauren Eber, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1158 n.18 (2006) (quoting Sen. John McCain, "We can pass all of the Rules changes we want in this body, but they are useless unless we back it up with a tough enforcement mechanism.").

⁶⁷ Martha Weinstein, *Mediation: Fulfilling the Promise of Democracy*, 74 FLA. B.J. 35, 35 (2000) (stating that mediation creates "structure without bureaucracy").

⁶⁸ SUSSKIND & CRUIKSHANK, *supra* note 24, at 11 (stating that, as a supplement to conventional decisionmaking procedures, "negotiated approaches to consensus building . . . have worked effectively in many situations" to facilitate cooperation among various interests); *id.* at 55 (describing face-to-face negotiations as a method to getting commitment from stakeholders to remedy the problem of non-commitment from political institutions); *see also* Laura L. Wright, Note, *Trade Promotion Authority: Fast Track for the Twenty-First Century?*, 12 WM. & MARY BILL RTS. J. 979, 996 (2004) (noting that where the legislature is given the choice of voting for or against pre-negotiated solutions, this "'all or nothing' methodology . . . reduces the pressure on representatives by special-interest groups"). Thus, facilitating negotiation among interests and then presenting these policies to Congress for approval will reduce lobbying pressures.

attempt negotiated consensus. Thus, the congressional power to compel mediation among competing interests that are tangled in a lobbying war may serve to improve the legislative process.

A. Current Practice and the Call for Mediation

Traditional legislative practices are becoming increasingly ineffective in addressing public policy disputes.⁶⁹ Public officials have difficulty managing the divisive influence of conflicting interests⁷⁰ that hinder movement in policymaking.⁷¹ These interest groups make it easier to block policy than to create it⁷² because they fragment the process by building a complicated web of shifting alliances.⁷³ Unresponsive to these interests, elections and traditional political activities do not resolve the disputes.⁷⁴ Though the legislative process provides for input from interest groups, it acts on bare majorities and does not promote sufficient long-term commitment to policies.⁷⁵ Because the affected parties do not have direct control in the representative system, any legislative action may provoke stakeholders to use indirect methods such as lobbying, tough media campaigns, and other means to assert leverage over the process, mainly by blocking governmental action.⁷⁶ These interest groups compete with one another to persuade and pressure elected representatives⁷⁷ under a winner-takes-all mindset.⁷⁸

Such a system, in promoting tough public posturing⁷⁹ and adversarial politics,⁸⁰ tends to discourage the affected parties from direct communication

⁶⁹ Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 ENVIRONS ENVTL. L. & POL'Y J. 49, 53 (Spring 2001); see also Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 347–48 (2004–05).

⁷⁰ Zeinemann, *supra* note 69, at 53.

⁷¹ SUSSKIND & CRUIKSHANK, *supra* note 24, at 3 (arguing that, as a result of the adversarial system of policymaking, "[p]ublic officials are unable to take action, even when everyone agrees that something needs to be done").

⁷² Telephone Interview with Sean P. Dunn, President, Sean Dunn L.L.C. (Mar. 5, 2007); see also SUSSKIND & CRUIKSHANK, *supra* note 24, at 3–8.

⁷³ Zeinemann, *supra* note 69, at 53.

⁷⁴ SUSSKIND & CRUIKSHANK, *supra* note 24, at 9.

⁷⁵ *Id.* at 39, 48.

⁷⁶ *Id.* at 4.

⁷⁷ Brett A. Williams, Comment, *Consensual Approaches to Resolving Public Policy Disputes*, 2000 J. DISP. RESOL. 135, 147.

⁷⁸ SUSSKIND & CRUIKSHANK, *supra* note 24, at 70–73.

⁷⁹ *Id.* at 137.

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and negotiation.⁸¹ Less negotiation creates greater risk for affected interests and involves higher transaction costs in policymaking.⁸² Also, the adversarial process often ignores the reality that public disputes are not zero-sum situations⁸³ and can, therefore, overlook consensual solutions⁸⁴ that would better satisfy the interests of petitioning groups.⁸⁵ These adversarial processes are ripe for the introduction of institutionalized mediation as a tool to facilitate agreement among affected interest groups.⁸⁶

Disputes among conflicting interest groups⁸⁷ can be handled under mediation,⁸⁸ where affected interests control the process while a neutral third party facilitates communication and encourages collaborative problem solving.⁸⁹ Mediation is a useful tool⁹⁰ for handling public conflicts because it is a democratic method of bringing interacting interests to consensus.⁹¹ These direct, facilitated negotiations are a flexible, rational means for addressing

⁸⁰ Christa Daryl Slaton, *An Overview of the Emerging Political Paradigm: A Web of Transformational Theories*, in TRANSFORMATIONAL POLITICS: THEORY, STUDY, AND PRACTICE 13 (Stephen Woolpert et al. eds., 1998) (describing the modern, liberal theory of politics as "adversarial").

⁸¹ Pub. L. No. 101-648, 1990 S 303.

⁸² McCaffery & Cohen, *supra* note 25, at 1181 n.53 ("[I]n negotiations between legislators and lobbyists, long-term legislation or 'deals' between the parties hold higher value because they reduce transaction costs and risks.").

⁸³ Williams, *supra* note 77, at 136.

⁸⁴ KENNETH CLOKE, *MEDIATION: REVENGE AND THE MAGIC OF FORGIVENESS* 274 (1990) (Mediation "allows conflicting parties to reach settlements that are satisfactory to each of them.").

⁸⁵ Williams, *supra* note 77, at 147 (stating that, because of a focus on adversarial mechanisms, "Often, the political process will not provide adequate solutions to the concerns of many interested individuals").

⁸⁶ Aric J. Garza, *Resolving Public Policy Disputes in Texas without Litigation: The Case for Use of Alternative Dispute Resolution by Governmental Entities*, 31 ST. MARY'S L.J. 987, 989 (2000).

⁸⁷ Linda L. Putnam, *Formal Negotiations: The Product Side of Organizational Conflict*, in CONFLICT AND ORGANIZATIONS: COMMUNICATIVE PROCESSES 184 (Anne Maydan Nicotera ed., 1995) (describing intergroup disputes which "often [arise] from coalitions or interest groups that unify under a common set of issues, beliefs, or values").

⁸⁸ CLOKE, *supra* note 84, at 275 ("Mediation can be used by individuals, groups, institutions, or entire societies.").

⁸⁹ Weinstein, *supra* note 67, at 35 (quoting CLOKE, *supra* note 84).

⁹⁰ Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 3 (1998) (stating that "mediation is a tool").

⁹¹ CLOKE, *supra* note 84, at 274.

various interests because they create an open, hostility-free environment where parties maintain control and confidentiality.⁹² Under this process, "[j]ustice is created rather than dictated."⁹³

B. *Benefits of Mediation among Lobbying Interests*

Mediation offers significant benefits to the legislation process. To bring this type of organized consensus-building into normal legislative functioning without burdening interests or clogging the system, the proposed mechanism of interest group mediation is hinged on lobbying expenditures. This section will present the practical realities of institutionalized mediation in legislatures and conclude that bringing opposing interests to mediate as part of lobbying reform will effectively channel their efforts towards cooperation without the burdensome requirements of consensus.

As applied to lobbying activity, mediation may lead to faster results, lower costs, more adaptable policies,⁹⁴ and other benefits,⁹⁵ because it involves direct participation from the affected interest groups.⁹⁶ The nature of conflict in legislative action always involves two sides.⁹⁷ While mediation would not apply to a dispute where a specific interest works against unilateral government action, lobbyists would contend that there is always an opposing interest to negotiate against.⁹⁸ Under the current system, conflicting interests hire lobbyists to influence legislative decisionmaking.⁹⁹ As a result, lobbyists filter communication¹⁰⁰ from constituents to legislators, who then create uncommitted, inflexible policies.¹⁰¹ However, facilitating direct discussions between conflicting interests to create consensual policies would

⁹² Cassandra G. Mott, Note, *Macy's Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case*, 14 OHIO ST. J. ON DISP. RESOL. 193, 207 (1998).

⁹³ Weinstein, *supra* note 67, at 36.

⁹⁴ Zeinemann, *supra* note 69, at 53.

⁹⁵ SUSSKIND & CRUIKSHANK, *supra* note 24, at 21–33 (identifying other benefits including fairness (21–25), efficiency (26–28), wisdom (28–30), and stability (31–33)).

⁹⁶ Zeinemann, *supra* note 69, at 53.

⁹⁷ Interview with Mike Toman, President, Ohio Lobbying Association, in Columbus, Ohio (July 26, 2007).

⁹⁸ *Id.*

⁹⁹ SCHNEIER AND GROSS, *supra* note 16, at 300–01.

¹⁰⁰ *Id.* at 300.

¹⁰¹ SUSSKIND & CRUIKSHANK, *supra* note 24, at 48.

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eliminate the filters¹⁰² and avoid unnecessary bureaucracy.¹⁰³ This mechanism can, furthermore, free issues from being held "hostage" for unrelated items in political compromises and create coherent, consistent packages of legislative action.¹⁰⁴ Also, because the outcome is not forced on any party, policies produced by consensus are more sustainable and easier to implement, creating efficiency in other branches of the government.¹⁰⁵ Thus, mediation among conflicting interest groups would increase efficiency in handling differences¹⁰⁶ and thereby free up the costs and efforts of both members of Congress and of competing interest groups.

Another outcome of direct communication among interest groups is more responsive policy.¹⁰⁷ Because it provides affected parties with direct control over proposals, the use of mediation in creating public policy empowers the interest groups.¹⁰⁸ Also, by addressing all interests through direct stakeholder participation,¹⁰⁹ mediation creates policies in consideration of as many different interests as possible.¹¹⁰ Thus, interests that are dissatisfied with narrow decisionmaking majorities¹¹¹ may eagerly welcome mediation as a process that aims at broad agreement in policymaking.¹¹²

¹⁰² Stephen P. Younger, *Effective Representation of Corporate Clients in Mediation*, 59 ALB. L. REV. 951, 958 (1996) (discussing the benefits of direct communication in that "[m]ediation allows a lawyer to speak directly to the client on the other side without having each communication filtered by another lawyer. This process should be used to its optimal benefit").

¹⁰³ Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355, 376-77 (2006).

¹⁰⁴ Zeinemann, *supra* note 69, at 54.

¹⁰⁵ Erbe, *supra* note 103, at 372.

¹⁰⁶ Weinstein, *supra* note 67, at 35 (promoting the use of mediation to resolve "organizational conflicts through consensus allowing a maximum of unity and a minimum loss in energy, time, and money").

¹⁰⁷ SUSSKIND & CRUIKSHANK, *supra* note 24, at 13; *see also* Zeinemann, *supra* note 69, at 53-54.

¹⁰⁸ CLOKE, *supra* note 84, at 274 (stating that mediation "encourages empowerment").

¹⁰⁹ SUSSKIND & CRUIKSHANK, *supra* note 24, at 11 (advocating "face-to-face interaction among specially chosen representatives of all 'stakeholding' groups").

¹¹⁰ Erbe, *supra* note 103, at 415 (stating that mediation "creates outcomes truly responsive to diverse needs at all levels of society through consensus-building").

¹¹¹ Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 408 (2000); *see also* SUSSKIND & CRUIKSHANK, *supra* note 24, at 39.

¹¹² Graber, *supra* note 111, at 408.

Some may argue that this direct involvement takes power away from the legislators¹¹³ and takes policymaking away from public scrutiny.¹¹⁴ It is true that interest group mediation would involve the drafting of public policy by interest groups in private confidential meetings. However, legislators would retain power over what disputes are mediated and whether the proposals are adopted.¹¹⁵ Because the confidential meetings involve interest groups and not elected or appointed officials, action under this scheme conforms to the purposes and requirements of Sunshine laws by keeping official decisionmaking open and public.¹¹⁶ This scheme allows unofficial action to remain appropriately private and keeps official action appropriately public.¹¹⁷ Thus, legislators would support interest group mediation and would retain the power and the duty to protect the public good in the public eye. In fact, legislators prefer that parties work out the dispute themselves, rather than having to choose one group over another,¹¹⁸ and almost always accept consensual proposals.¹¹⁹

Another criticism may be that forcing issues through consensus-based processes hinders development and promotes the status quo.¹²⁰ Because interest group mediation provides the means to hinge lobbying ability on participation in mediations, Congress will be able to force groups to negotiate over an issue. The method for doing this may involve a limitation or a reduction in lobbying expenditures that takes effect when the interest groups are not participating in good-faith, productive negotiations. This

¹¹³ Zeinemann, *supra* note 69, at 53.

¹¹⁴ H.R. REP. NO. 94-880, at 2 (1976) ("The basic premise of the Sunshine legislation is that, in the words of Federalist No. 49, 'the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived.' Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.").

¹¹⁵ *Id.*

¹¹⁶ Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 476 (1997) ("The Act requires every portion of every meeting of an agency . . . to be open to public observation. A 'meeting' is defined as deliberations which include the number of individuals required to make decisions on behalf of an agency, and result in disposition of agency business.") (emphasis added).

¹¹⁷ S. REP. NO. 94-354, at 1 (1975) (stating that "government should conduct the public's business in public").

¹¹⁸ Dunn, *supra* note 72; see also SUSSKIND & CRUIKSHANK, *supra* note 24, at 136.

¹¹⁹ Zeinemann, *supra* note 69, at 53.

¹²⁰ BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 63 (2004); see also Toman, *supra* note 97; Dunn, *supra* note 72.

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dynamic will create an incentive for the groups to participate in the mediation while simultaneously controlling lobbying expenditures. However, the reason that this system does not hinder valid action with burdensome consensus building is that the proposed mechanism is imposed only on the interest groups and can be applied evenly. By consuming only the efforts of the direct interests, the lobbyists remain able to address the issue with traditional methods. Though this procedure constrains lobbying action by imposing spending controls on interests, Congress will be able to apply these limitations to both sides of an issue evenly, meaning that neither side gets an advantage in the adversarial forum while participating in mediation. Thus, by synthesizing a forum for antagonistic political debate with a forum for effective stakeholder negotiation, this process may combine the beneficial qualities of both adversarial and cooperative approaches while mitigating the disadvantages of each.¹²¹ Interest group mediation would therefore promote collaboration and efficiency without disrupting or threatening Congress's proper role in policymaking.

As proposed, interest group mediation therefore creates a rational and coherent process without hindering current legislative practices. Recognizing the potential benefits of cooperation among interests in creating policy, many argue that "federal, state, and local governments must resolve to increase their use of consensual processes when confronted with public disputes."¹²² Interest group mediation may be an optimal vehicle for this consensus-building—it does not promote the status quo because it allows affected interests to spend money on lobbying as long as they participate in good-faith, productive mediation. Because it is hinged on lobbying expenditures, interest group mediation is a flexible, rational method of institutionalizing mediation in congressional practices.

C. Interest Group Mediation in Political and Corporate Lobbying Disputes

Aside from being more efficient and responsive, interest group mediation has much promise when specifically used with the corporations and political groups that regularly lobby Congress. Though groups that represent opposing

¹²¹ Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 77 (1988) (discussing the possibility of "abandoning the notion of a choice between adversarial and cooperative models and developing instead institutional structures that combine the virtues and mitigate the disadvantages of each").

¹²² Williams, *supra* note 77, at 151.

political values put forth seemingly irreconcilable public positions,¹²³ they are indeed capable of calmly discussing and clarifying positions on fundamental political disagreements¹²⁴ even when they involve divisive issues.¹²⁵ Such a process may uncover common ground and alternative solutions which recognize diverse interests while acknowledging and legitimizing areas of disagreement.¹²⁶ Therefore, mediation may be an effective method for dealing with interest groups that have a political dispute.

Corporations are also a major player in congressional lobbying¹²⁷ because, in competing with each other for market privilege,¹²⁸ they become involved in difficult conflicts¹²⁹ on a regular basis.¹³⁰ In competing in the lobbying arena, these businesses victimize each other¹³¹ through expensive, escalating offensive and defensive lobbying campaigns.¹³² Corporations often end up spending much of their lobbying efforts solely on counteracting their competitors' lobbying expenditures.¹³³ This "collective action problem"¹³⁴ could be handled more efficiently by creating concerted action through a uniform regulation.¹³⁵ Congress can offer petitioning interests the opportunity to avoid mutually destructive actions by compelling the parties

¹²³ SUSSKIND & CRUIKSHANK, *supra* note 24, at 137.

¹²⁴ CLOKE, *supra* note 84, at 274.

¹²⁵ Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity*, 12 DISP. RESOL. MAG. 18, 18 (Winter 2006) (stating that consensual public policymaking methods "have also been applied in addressing divisive political issues such as affirmative action and abortion").

¹²⁶ *Id.*

¹²⁷ Silverstein & Taylor, *supra* note 2, at 266 (describing lobbyists as the "great majority whom work for business interests").

¹²⁸ GUNNING, *supra* note 38, at 349 ("Many large companies today in the more developed democracies employ resources to seek market privilege. The result is a large lobbying industry.").

¹²⁹ McEwen, *supra* note 90, at 9 (1998) ("Contentious and competitive corporate cultures could both encourage disputes in the first place and get in the way of their efficient resolution.").

¹³⁰ *Id.* at 6 ("[B]ig businesses regularly find themselves embroiled in conflicts.").

¹³¹ Sitkoff, *supra* note 45, at 1125 (2002) (stating that through "redistributive lobbying, corporations as a class, for the most part, victimized other corporations").

¹³² Silverstein & Taylor, *supra* note 2, at 265 ("Corporate lobbyists do not win every battle, but when they lose, it is often because a competing corporate faction bought up even more lobbying firepower.").

¹³³ See *supra* Part II.B (discussing defensive lobbying).

¹³⁴ Sitkoff, *supra* note 45, at 1125.

¹³⁵ *Id.* at 1106, 1125.

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to negotiate under mediation, allowing them to jointly roll back defensive lobbying efforts. Besides creating the opportunity for corporations to cooperate in reducing inefficient lobbying practices, mediation provides a new perspective that "has the potential to promote effective management that makes resolution faster, less expensive, and of higher quality."¹³⁶ Thus, interest group mediation is particularly suited for corporate conflicts that are conducted through legislative lobbying practices.

Because interest group mediation would benefit both political interest groups (by empowering them and causing them to reach out to a greater number of people) and corporations (by facilitating more cooperative business and reducing lobbying costs) this program would be fully acceptable to lobbying interests. As demonstrated above, by pushing competing interests into direct communication under the productive guidance of mediation, Congress can avoid superfluous lobbying battles that consume the attention of legislators and the money of interest groups. Mediation is ideal because it is a soft, process-based mechanism that conducts political speech instead of limiting it and provides "structure without bureaucracy."¹³⁷ Thus, compulsory mediation can be a lobbying reform mechanism that would use facilitated negotiations to resolve legislative disputes and serve as a model for coercion-free, community-empowering conflict resolution.¹³⁸

Interest group mediation seems to be a logical solution to problems in lobbying reform and legislative interactions. The only problem is that because such structured mediation in Congress is untested, this system is somewhat speculative. However, the use of structured mediation in creating public policy exists in other areas of American government and these practices can serve as guidance for the interest group mediation system.

IV. EXAMPLES OF CONSENSUS-BASED PUBLIC POLICYMAKING

While there is no evidence of structured mediation in congressional practices, such consensual methods are not uncommon to public policymaking. The established practices of negotiated administrative rulemaking and public dispute resolution will serve as guiding examples.

¹³⁶ McEwen, *supra* note 90, at 6 (1998) (adding that under corporate "management of disputing . . . Where the management of disputing is weak or inconsistent, costs appear higher, disputes longer, and relationships in greater jeopardy, but where that management is coherent, strong, and oriented to reasonable settlement, costs are likely to be lower, disputes shorter, and relationships more often preserved").

¹³⁷ Weinstein, *supra* note 67, at 35.

¹³⁸ CLOKE, *supra* note 84, at 276.

Because of similarities in the parties involved and the methods used, successful use of mediation by these political institutions in creating public policy heralds similar results in mediation among interest groups as proposed in this Note.

A. *Negotiated Rulemaking*

The use of mediation among interested parties in direct negotiation is already an established policymaking process in the federal government. Under the Negotiated Rulemaking Act,¹³⁹ federal administrative agencies convene¹⁴⁰ a committee composed of interested parties¹⁴¹ that informally negotiate under the guidance of a facilitator¹⁴² in order to reach consensus¹⁴³ on the substance of a proposed rule.¹⁴⁴ This mediation mechanism allows agencies to involve affected interests in the process of drafting a rule¹⁴⁵ as a way to supplement normal procedure.¹⁴⁶ When used in appropriate

¹³⁹ Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 (2000).

¹⁴⁰ 5 U.S.C. § 563(a) (2000) ("An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule.").

¹⁴¹ 5 U.S.C. § 563(b)(2)(b) (2000) (stating that the committee can contain "[p]ersons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented"); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256–57 (1997) ("The agency establishes a committee comprised of representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff.").

¹⁴² 5 U.S.C. § 566(d)(2) (2000) (stating that the facilitator has the duty to "impartially assist the members of the committee in conducting discussions and negotiations").

¹⁴³ 5 U.S.C. § 562(7) (2000) (stating that the committees are to "discuss issues for the purpose of reaching a consensus in the development of a proposed rule").

¹⁴⁴ Williams, *supra* note 77, at 149 ("[R]epresentatives of the agency and other interested parties engage in face-to-face negotiations concerning the text of the proposed rule. The parties work toward achieving a consensus on the rule, at which point the APA notice and comment provisions take over.").

¹⁴⁵ Scott F. Johnson, *Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements*, 4 PIERCE L. REV. 435, 446 (2006).

¹⁴⁶ Coglianese, *supra* note 141, at 1256 ("Negotiated rulemaking supplements the notice-and-comment procedures of the Administrative Procedure Act (APA) with a negotiation process that takes place before an agency issues a proposed regulation.").

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disputes,¹⁴⁷ this process promises to increase the acceptability and improve the substance of rules.¹⁴⁸

Congress created this mechanism to improve the process of administrative rulemaking. Rulemaking is a legislative, policymaking power delegated to administrative agencies¹⁴⁹ to implement broad Congressional mandates.¹⁵⁰ In order to ensure that agencies remained in the bounds of the legislature's will in using this power, Congress set up mechanisms to structure agency discretion¹⁵¹ and the courts apply judicial review over agency decisions.¹⁵² One method of guiding administrative rulemaking is to open the proceedings to public input¹⁵³ through "notice and comment" procedures¹⁵⁴ and have interested lobbyists monitor agency action.¹⁵⁵ However, listening to both sides of a problem and liberal judicial review are major sources of delay and inefficiency.¹⁵⁶ More importantly, critics argue that notice and comment and litigation rights do not create adequate citizen responsiveness.¹⁵⁷ These forms of public participation do not usually involve

¹⁴⁷ Williams, *supra* note 77, at 149 ("[N]egotiated rulemaking is more appropriate in certain circumstances than in others.").

¹⁴⁸ 5 U.S.C. § 581 NOTE, Section 2 Findings (5) (2000).

¹⁴⁹ WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESSES 36 (1985).

¹⁵⁰ 5 U.S.C. § 551(4) (2000) (defining a rule as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").

¹⁵¹ WEST, *supra* note 149, at 3–4, 7.

¹⁵² David H. Becker, *Changing Direction in Administrative Agency Rulemaking: "Reasoned Analysis," the Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS ENVTL. L. & POL'Y J. 65, 67 (Fall 2006) ("[C]ourts have continued to engage in, and commentators to advocate, meaningful judicial review of agency changes of direction in rulemaking.").

¹⁵³ Robin McCall, Note, *Dogs vs. Birds: Negotiated Rulemaking at Fort Funston*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 187, 203 (2007) ("[W]hen an agency makes a rule, it accepts public input and then makes the rule under its own discretion.").

¹⁵⁴ 5 U.S.C. § 553 (2000); *see also* WEST, *supra* note 149, at 78.

¹⁵⁵ *See* David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227, 227 (1995).

¹⁵⁶ SUSSKIND & CRUIKSHANK, *supra* note 24, at 35–37.

¹⁵⁷ Adam N. Bram, Note, *Public Participation Provisions Need Not Contribute to Environmental Injustice*, 5 TEMP. POL. & CIV. RTS. L. REV. 145, 159 (1996) (asserting that processes "that provide little more than notice, opportunities for comment, or a right to litigate frequently fail to accomplish the goals of citizen involvement").

real consensus-building¹⁵⁸ and the interaction rarely goes beyond one-way transfers of information.¹⁵⁹ As a result, most of the resulting rules must undergo judicial review because of challenges by unsatisfied groups.¹⁶⁰

Noting the inherent defects of adversarial procedures¹⁶¹ and the widespread use of consensus-based mechanisms in the private sector and the courts,¹⁶² Congress supplemented conventional rulemaking with opportunity for more proactive stakeholder involvement¹⁶³ under structured, nonadversarial structures.¹⁶⁴ This mechanism therefore promotes¹⁶⁵ the established¹⁶⁶ practice of involving citizens in drafting proposals.¹⁶⁷ Under this structure, the stakeholders create the proposed rule through negotiation and the officials retain the ultimate decision on whether to implement it.¹⁶⁸

¹⁵⁸ McCall, *supra* note 153, at 203 (describing the "hands off" approach taken in rulemaking where "[t]he agency does not sit down and hammer out a consensus with members of the public, regardless of the importance of their interests" and where the agency only needs to aim for reasonableness).

¹⁵⁹ Bram, *supra* note 157, at 164 ("[T]he information often passes only one way. The agency is either giving information or taking information. Seldom does the information exchange as dialogue.").

¹⁶⁰ SUSSKIND & CRUIKSHANK, *supra* note 24, at 3 ("Most regulations issued by agencies such as the EPA lead to adjudication from competing concerns as being too tough or not tough enough.").

¹⁶¹ 5 U.S.C. § 561 NOTE, Section 2 Findings (3) (2000) ("Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.").

¹⁶² See Charles Pou, Jr., *Federal ADR and Negotiated Rulemaking Acts Receive Permanent Reauthorization*, 22 ADMIN. & REG. L. NEWS 4, 4 (1997).

¹⁶³ Bram, *supra* note 157, at 163.

¹⁶⁴ Williams, *supra* note 77, at 149.

¹⁶⁵ 5 U.S.C. § 561 NOTE, Section 2 Findings (6) ("The process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking.").

¹⁶⁶ *Id.* (stating that by the time the Negotiated Rulemaking Act came into force, "[s]everal agencies [had] successfully used negotiated rulemaking").

¹⁶⁷ Johnson, *supra* note 145, at 446 (describing the established practice of "informal rulemaking" wherein "an agency generally drafts a proposed regulation internally based on staff recommendations, or recommendations of committees or groups formed to research an issue within the jurisdiction of the agency").

¹⁶⁸ McCall, *supra* note 153, at 203.

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Because mediation is a proven method of avoiding litigation¹⁶⁹ and effectively addressing multiple concerns,¹⁷⁰ its use in negotiated rulemaking is a logical solution to the inefficiencies that face the rulemaking process.¹⁷¹ Thus, mediation among interested parties is applied to public policy decisions under negotiated rulemaking in order to increase the efficiency and effectiveness of agency decisionmaking.

The benefits of negotiated rulemaking are manifold. First, the regulations developed by this process are of a higher quality than those developed by strictly adversarial means. When employed in the appropriate disputes, negotiated rulemaking can bring polarized interests to a consensus over policy issues¹⁷² and therefore often creates more acceptable policies.¹⁷³ This process presents a "golden opportunity" for interest groups to have direct control over public policy.¹⁷⁴ Also, negotiated rulemaking expands the potential for creativity in creating widely-acceptable regulations.¹⁷⁵ Finally, negotiated rulemaking also has the potential to make the rulemaking process more efficient by smoothing out difficulties and preventing unnecessary adjudication.¹⁷⁶ So far, many potential participants continue to have an ingrained adversarial mindset¹⁷⁷ and exhibit discomfort with cooperative

¹⁶⁹ Richard M. Cartier, *Mediating Local Intergovernmental Disputes—Reflections on the Process*, 13 SANJALR 1, 2 (2003) ("A successful mediation can help parties avoid the acrimony associated with litigation.").

¹⁷⁰ Mott, *supra* note 92, at 205.

¹⁷¹ From notice and comment procedures and liberal judicial review that overwhelm the system. See WEST, *supra* note 149, at 51 ("[N]otice-and-comment provisions . . . guarantee that interested parties will have the right to submit written or oral comments on the merits of proposed rules."); *id.* at 48 ("[A]ffected persons could hold officials accountable through challenge by judicial review.").

¹⁷² Williams, *supra* note 77, at 150.

¹⁷³ *Id.* at 150.

¹⁷⁴ McCall, *supra* note 153, at 204.

¹⁷⁵ Williams, *supra* note 77, at 151 ("By increasing the use of consensual processes to resolve public disputes, 'parties can find solutions to problems that cannot be addressed by judicial remedies' and 'can achieve results . . . that would be difficult or impossible to obtain through adjudicatory processes.'").

¹⁷⁶ Johnson, *supra* note 145, at 447 ("The rationale behind negotiated rulemaking is that the negotiation process will make the remaining parts of the notice and comment process run smoother, and there will be less objection to the proposed rule because the key stakeholders affected by the rule helped draft it.").

¹⁷⁷ Pou, *supra* note 162, at 14 ("[I]n many enforcement agencies and in others . . . adversarial relations with regulated parties, contractors, grant recipients, advocacy groups, or even employee unions are still ingrained.").

processes,¹⁷⁸ limiting the application of this beneficial process.¹⁷⁹ Despite some initial reservation, Congress now fully accepts these consensual methods as beneficial tools in policymaking,¹⁸⁰ and rulemakers use negotiated rulemaking in creating many successful policies.¹⁸¹ Thus, while mediation is no panacea,¹⁸² "in appropriate circumstances, consensual settlement processes may . . . resolve public disputes with greater effectiveness than traditional judicial and administrative adjudication."¹⁸³

The success experienced by the administrative branch with negotiated rulemaking predicts similar results in the legislative branch with interest group mediation. Interest groups must lobby executive agencies to make sure the bills that they pushed through the legislature are correctly implemented once enacted into law.¹⁸⁴ As a result, the stakeholders that create regulations in negotiated rulemaking are largely the same interest groups that lobby Congress.¹⁸⁵ The participants of this proposed process are therefore familiar with, or at least aware of, consensual policymaking. The parallel between the rulemaking and legislation processes,¹⁸⁶ and the use of the same groups that comprise the mediated committees under negotiated rulemaking,¹⁸⁷ leads to

¹⁷⁸ *Id.* ("Many steps remain to be taken if these consensus methods of decisionmaking are to gain the kind of broad-based acceptance and use throughout the government that they merit.").

¹⁷⁹ Williams, *supra* note 77, at 150 ("[T]he overall use of these procedures has been somewhat limited.").

¹⁸⁰ See McCall, *supra* note 153, at 203 ("Congress prefers agencies to use reg-neg when it 'enhances the informal rulemaking process.'"); see also Pou, *supra* note 162, at 4 ("Congress, along with many federal agencies, have moved beyond an initial skepticism and concern over potential abuses to a point where they have begun to view ADR methods as safe and effective.").

¹⁸¹ See case studies summarized in McCall, *supra* note 153, at 204–06 (2007); see also Williams, *supra* note 77, at 149 ("[T]he EPA has used [these consensual methods] in rulemaking under the Clean Air Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and various other environmental regulations to great success.").

¹⁸² Williams, *supra* note 77, at 150 ("While clearly not a panacea, environmental mediation should play an increasingly important role in resolving . . . environmental disputes.").

¹⁸³ *Id.*

¹⁸⁴ See BRUCE C. WOLPE & BERTRAM J. LEVINE, *LOBBYING CONGRESS: HOW THE SYSTEM WORKS* 69 (2d ed. 1996); see also Epstein & O'Halloran, *supra* note 155.

¹⁸⁵ Williams, *supra* note 77, at 148 ("[I]nterest groups that lobbied hard during the bill-drafting stage are very likely to remain involved in the administrative rulemaking process.").

¹⁸⁶ See WEST, *supra* note 149, at 36.

¹⁸⁷ Coglianese, *supra* note 141, at 1257.

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the logical inference that a similar process to negotiated rulemaking will work in Congress. Thus, negotiated rulemaking serves as an example of the success of mediation among interest groups in creating policy and promises similar results for congressional lobbying.

B. *Public Dispute Resolution*

State and local legislatures commonly use mediation through the general practice of public dispute resolution. Public policy disputes can be complicated matters that affect a variety of interests¹⁸⁸ beyond legal rights¹⁸⁹ and require high levels of technical expertise.¹⁹⁰ Affected interests bring these battles to legislatures because litigation is an ineffective forum for complicated, interest-focused disputes.¹⁹¹ Faced with such a problem, the legislature may feel in over its head and decide to abandon traditional deliberative filters for an opportunity to structure cooperation among the petitioning interests.¹⁹² Though a variety of collaborative mechanisms are available,¹⁹³ public dispute resolution often involves mediated negotiation among stakeholder representatives to create agreements that the government then adopts as public policy.¹⁹⁴

Under this process, a neutral mediator gathers affected parties and facilitates consensus on public policy.¹⁹⁵ The mediator is crucial because, without his or her assistance, the parties would not be able to work out an agreement.¹⁹⁶ Typically, public policy disputes involve division in the

¹⁸⁸ Center for the Resolution of Disputes, <http://www.cfrdmediation.com/public-policy.aspx> (last visited Feb. 14, 2007) ("Public Policy disputes can involve many parties with differing points of view."); see also SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE TO HANDLING CONFLICT AND REACHING AGREEMENTS* 5 (1988).

¹⁸⁹ Williams, *supra* note 77, at 136 (stating that these issues "involve much more than legal rights").

¹⁹⁰ CARPENTER & KENNEDY, *supra* note 188, at 5–6.

¹⁹¹ Williams, *supra* note 77, at 135 ("A comparison of the typical public policy disputes within the general private civil suit reveals the shortcomings of litigation as a tool for resolving public conflict.").

¹⁹² See *Case Study: Legislature Uses Mediation to Craft Illinois Telecommunications Act*, 8 DISP. RESOL. MAG. 1 (Winter 2002).

¹⁹³ See case studies cited *infra* notes 204–20.

¹⁹⁴ Carri Hulet, *A Glossary of Deliberative Democracy Terms*, 12 DISP. RESOL. MAG. 27, 27 (Winter 2006).

¹⁹⁵ Center for the Resolution of Disputes, *supra* note 188.

¹⁹⁶ SUSSKIND & CRUIKSHANK, *supra* note 24, at 137–38.

community, miscommunication, and distorted perceptions.¹⁹⁷ However, by enlisting the active involvement and support of local interests, this process creates policies that fully satisfy the community and elected officials.¹⁹⁸ Common disputes that are handled under public dispute resolution include environmental issues,¹⁹⁹ zoning,²⁰⁰ public nuisances,²⁰¹ and other conflicts that involve the allocation of resources²⁰² or complex, multilateral negotiations.²⁰³

Though mediated, face-to-face negotiations among interest groups are untested in Congress, various state legislature have used these practices to notable success. The three examples below illustrate how and why mediation leads to improved results in public policymaking. The first example concerns public policy over the telecommunications industry in Illinois.²⁰⁴ In 2001, the Illinois General Assembly faced the task of crafting a new telecommunications policy that addressed competing interests in the field.²⁰⁵ With input coming from corporations, citizens, and experts, the House Speaker decided to depart from the traditional committee model and use a third-party neutral to mediate a multiparty joint session of stakeholders.²⁰⁶ The neutral addressed this conflict with "traditional mediation, alternating between joint sessions and private caucuses" in order to facilitate discussion between the legal decisionmakers and the technical experts and support them as they jointly drafted the legislation.²⁰⁷ The product of these efforts was a bill that creatively addressed various interests and received overwhelming support in passing both houses. In retrospect, "months of mediation and

¹⁹⁷ CARPENTER & KENNEDY, *supra* note 188, at 12–15.

¹⁹⁸ See Stephen R. Marsh, *Public Policy Mediation* (2000), <http://adrr.com/adr3/public.htm> (last visited Feb. 10, 2008).

¹⁹⁹ Zeinemann, *supra* note 69, at 54–59.

²⁰⁰ The Center for the Resolution of Disputes, *supra* note 188 (citing examples including an "agreement on a comprehensive revision of the Hamilton County, Ohio Zoning Code" and an "agreement on revisions to the hospital zoning restrictions").

²⁰¹ *Id.* (citing, for example, an "agreement on regulations to govern the disposal of construction and demolition debris in Ohio").

²⁰² SUSSKIND & CRUIKSHANK, *supra* note 24, at 17.

²⁰³ Erbe, *supra* note 103, at 379 ("Mediation's facilitated consensus-building benefits more complex conflicts involving diverse stakeholders and long-term relationships.").

²⁰⁴ *Case Study: Legislature Uses Mediation to Craft Illinois Telecommunications Act*, *supra* note 192, at 1.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2.

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negotiation helped to expedite the legislative process and produce a fair, well-balanced bill that set the foundation for a new telecommunication policy throughout Illinois."²⁰⁸ Thus, mediation among affected interests proved to be an effective, efficient process in addressing this public policy dispute.

The second example involves a zoning dispute between the city of Draper, Utah, and the Metropolitan Water District of Salt Lake City over the creation of a water treatment facility.²⁰⁹ After the parties reached deadlock on acceptable use of the land, the dissatisfied side sought an exemption from the zoning requirements in the state legislature.²¹⁰ This action brought protective action from parties satisfied with the status quo, leading the legislature to become the battleground for this issue. The result was a "lobbying blitz" from the affected parties and hours of time spent on floor debates as the bill crawled through traditional legislative processes.²¹¹ Throughout this conflict, the disputants became emotional and frustrated, while the "legislators felt trapped in a fight that all acknowledged they were poorly equipped to address."²¹²

In response to this dire situation, House Committee Chair Kory Holdaway agreed to the sponsor's request that the problem be addressed by a working group composed of representatives of various affected groups that would seek to bring conflicting interests to voluntary consensus.²¹³ Under this collaborative process, the discussion evolved to a focus on the broader question of how best to address the conflict.²¹⁴ The groups identified issues, explored options, revised approaches, and reached consensus with ideas from all participants.²¹⁵ Though the conflict was complicated and involved many affected interests, the working group was able to generate consensus that was translated into an effective and wide-reaching policy.²¹⁶

Another example involved a bipartisan, bicameral task force created to address the impending boom in the need for long-term care for seniors in

²⁰⁸ *Id.*

²⁰⁹ *Case Study: Utah Legislature Builds Consensus*, Policy Consensus E-News 1 (Apr. 2004), http://www.policyconsensus.org/casestudies/docs/UT_Legislature.pdf (last visited Mar. 5, 2008).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 1–2.

²¹⁴ *Id.* at 2.

²¹⁵ *Case Study: Utah Legislature Builds Consensus*, *supra* note 209, at 2.

²¹⁶ *Id.* at 3.

Minnesota.²¹⁷ In order to organize stakeholder participation within this structure, the task force "retained a neutral third party with . . . expertise in health care . . . [who] facilitated discussions and provided an essential link between task force members and the stakeholder groups."²¹⁸ The task force heard from experts, members of the public, and organized focus groups, and then effectively conveyed the information to the legislature as a whole.²¹⁹ Through the collaborative participation of stakeholders, the legislature was able to create an innovative, effective policy. In commenting on her experiences as a member of the task force, Minnesota State Senator Shelia Kiscaden, claimed that they "had a great deal of success using work groups, joint task forces, and facilitated discussions to arrive at decisions on tough issues" and that "these approaches have enabled us to find common ground, and at the same time, streamline our decision-making process."²²⁰

C. How Consensus-Based Approaches Arise

The above mechanisms reveal conclusions as to why governments adopt consensus-based approaches to policymaking. Negotiated rulemaking arose out of the inefficiency of giving weight to individual interests through open, multiparty participation and liberal judicial review. Public dispute resolution is a natural development in state legislatures that are overburdened with petitioning interests and technical information. The similarity between these programs is that they both arise from the stresses of dealing with pressures from diverse interests. In order to address individual concerns in complicated disputes, these new processes abandon traditional, adversarial approaches in favor of innovative, consensual methods. The lobbying crisis is a parallel situation of government structures being overburdened with petitioning interests and facing the negative consequences of this pressure. The lobbying issue, therefore, is reason and incentive for Congress to adopt greater use of consensus-based mechanisms.

²¹⁷ *Case Study: Minnesota Legislature Collaborates to Reform Long Term Care*, Policy Consensus E-News 1 (2000), http://www.policyconsensus.org/casestudies/docs/MN_Healthcare.pdf (last visited Mar. 5, 2008).

²¹⁸ *Id.* at 1–2.

²¹⁹ *Id.* at 2.

²²⁰ *Id.*

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V. POLICY RECOMMENDATIONS

While existing practices of public policy mediation²²¹ and literature on conducting such processes²²² provide guidance for interest group mediation, the policy must be tailored to fit congressional structures. In order to implement the beneficial process described above, Congress must decide how it will bring parties to the negotiating table and then adopt the resulting agreements.

A. Initiating the Mediation

There are two possible methods for initiating interest group mediation that are not mutually exclusive. First, the parties, on their own accord, may initiate the process under a jointly-hired, private mediator. Second, Congress may organize the process and compel interest groups to participate in lieu of lobbying.

Interest groups that are competing over a policy may realize that their adversarial tactics are costly and inefficient,²²³ especially in the case of mutual defensive lobbying,²²⁴ and that cooperation and self-determination may better serve their well-being.²²⁵ These interest groups may want to spend less on lobbying, which cannot guarantee beneficial outcomes,²²⁶ and hire a private lobbyist-mediator that is familiar with congressional practices, experienced in policy dispute resolution, and neutral as to the issue at hand.²²⁷ If the parties reconcile their differing interests and reach agreement on a proposal, Congress will likely adopt it and further conflicting lobbying

²²¹ See *supra* Part IV.

²²² See SUSSKIND & CRUIKSHANK, *supra* note 24.

²²³ CARPENTER & KENNEDY, *supra* note 188, at 26.

²²⁴ See *supra* Part II.B (describing defensive lobbying as the hiring of lobbyists to undermine future adverse action or protect past gains in the legislature).

²²⁵ James R. Coben, *Gollum Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 76 (2004) (noting that nothing "could honor the free market more efficiently than corporate players freeing themselves of legislative and court mandates" by reaching private agreement).

²²⁶ SCHNEIER & GROSS, *supra* note 16, at 301 (stating that "[w]hether or not they have the political clout to pass a bill," the lobbyist can guarantee information. Thus, they can guarantee information but not outcome.).

²²⁷ SUSSKIND & CRUIKSHANK, *supra* note 24, at 139.

will be precluded.²²⁸ Thus, the parties may act on their own initiative to save costs and create deals with the guidance of a mediator. However, because parties to these disputes are conditioned to think adversarially²²⁹ and feel the need to maintain tough, non-cooperative public postures,²³⁰ this voluntary cooperation is currently unlikely.²³¹ The remainder of this Note will therefore expand on the second option—mandatory mediation among the interest groups—and the procedures necessary to effect this structure.

Congress may effectively compel lobbying interests into mediation without hindering lobbyist activity. Once a group spends a certain amount on lobbying, as revealed under disclosure laws,²³² it may be compelled to mediate with opposing interests under congressional discretion.²³³ Congress may effectively convene multiparty mediations under the power of the House Rules Committee.²³⁴ Doing so requires identifying key players, making sure the power relationships are adequately balanced, making sure that there is a legitimate spokesperson for each interest, setting deadlines, and framing the dispute.²³⁵ The participants in these discussions should be the leaders²³⁶ or direct representatives of the affected groups and not the lobbyists.²³⁷ The

²²⁸ Zeinemann, *supra* note 69, at 53 (stating that "decision-makers almost always accept consensus accords"); *see also* Dunn, *supra* note 72 (noting that legislatures prefer it when parties work out the problems themselves).

²²⁹ *See* CARPENTER & KENNEDY, *supra* note 188, at 26.

²³⁰ SUSSKIND & CRUIKSHANK, *supra* note 24, at 137, 140.

²³¹ *Id.* at 138 ("[T]he overriding reality is that these parties are unlikely to resolve their dispute without help.").

²³² LUNEBURG & SUSMAN, *supra* note 47, at 7.

²³³ In common mandatory mediation programs, the "legislatures authorized courts to mandate mediation and the courts are exercising that power" as applied to legal disputes. Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 104. However, here the legislature is authorizing itself the power to mandate mediation of legislative disputes.

²³⁴ Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 220 (1984) (describing the power of the House Rules Committee as an "array of agenda control devices").

²³⁵ SUSSKIND & CRUIKSHANK, *supra* note 24, at 189–92.

²³⁶ WOLPE & LEVINE, *supra* note 184, at 33 (advocating participation of senior executives of businesses because they are "knowledgeable about their business, influential in industry, and respected in community").

²³⁷ SUSSKIND & CRUIKSHANK, *supra* note 24, at 11 (advocating "face-to-face interaction among specially chosen representatives of all 'stakeholding' groups").

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stakeholders are more knowledgeable as to their particular interests,²³⁸ and lobbyists would object to a mandatory procedure that would disrupt their normal activities.²³⁹ The mediator should be qualified,²⁴⁰ familiar with congressional practices,²⁴¹ neutral as to the dispute,²⁴² and may be chosen by the parties.²⁴³ Thus, interest group mediation would require a new congressional subcommittee on mediation under the House Rules Committee that would chose appropriate disputes for mediation²⁴⁴ and convene representatives of all affected interests²⁴⁵ for negotiations under the guidance of a competent, respected mediator.

Congress would apply this duty to mediate under a statute or a congressional rule that could subject any interest group or corporation that reaches a certain level of lobbying expenditures to mediation under the subcommittee's discretion.²⁴⁶ This mechanism would have the advantage of a contractual mediation clause by creating a degree of consent in conditioning the mechanism on voluntary lobbying activity. Also, in directing attention to disputes that are serious enough to enter the lobbying-expenditure threshold,

²³⁸ WOLPE & LEVINE, *supra* note 184, at 32 (advising lobbyists to involve their clients in the actual process because "no one understands the client's business better than the client").

²³⁹ Dunn, *supra* note 72 (disagreeing with the idea of mediation as the only avenue, arguing that this would obstruct lobbyist activities in a way that would work to preserve the status quo).

²⁴⁰ Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 881 (2002) (stating that "mediators must have qualifications necessary to satisfy the reasonable expectations of the parties").

²⁴¹ SUSSKIND & CRUIKSHANK, *supra* note 24, at 150 (stating that the mediators chosen "usually need to be quite conversant with the ways in which the public sector operates").

²⁴² *Id.* at 138–39.

²⁴³ *Id.* at 197.

²⁴⁴ Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 288 (1992) ("Legislatures, courts, and parties mandating mediation for certain controversies must confront two questions: first, whether the controversy is suitable for mediation; and second, whether it is appropriate to *mandate* mediation of the controversy."). For an example of typical criteria, see Zeinemann, *supra* note 69, at 61.

²⁴⁵ Bram, *supra* note 157, at 159 (stating in a discussion of public participation provisions that "Congress must enact statutory provisions that spare rhetoric and actually guarantee all affected citizens opportunities for meaningful public participation").

²⁴⁶ Nelle, *supra* note 244, at 300 ("At least three different ways to establish a duty to mediate exist: by a general rule (statute or court rule), by individual referral (by a court), or by a contractual mediation clause.").

the program would be tailored to address situations where it would be most beneficial.²⁴⁷

In light of the irrational barriers to consensual negotiation, this coercive mechanism may be helpful in initiating mediation of legislative disputes.²⁴⁸ First, mandatory mediation is the best way to overcome the non-cooperative public posturing²⁴⁹ that commonly prevents cooperation among interest groups.²⁵⁰ In fact, this procedure helps the parties by allowing them to maintain a tough appearance to their constituents while fully participating in cooperative discussions.²⁵¹ Compelling mediation is also an effective way to address non-communication among parties.²⁵² Because the affected interests often do not communicate with opposing interest groups²⁵³ or opposing Congresspeople,²⁵⁴ mandatory mediation may be necessary in replacing indirect communication through lobbyists²⁵⁵ with more beneficial direct communication.²⁵⁶ Mandatory mediation may also overcome the "agency problem" of lobbyists potentially opposing cooperation as a threat to their highly lucrative market on indirect influence.²⁵⁷ Just as lawyers may oppose time-efficient mediation practices as a threat to their monetary interests, so may lobbyists oppose interest group mediation.²⁵⁸ Thus, compulsory mediation can serve as an effective tool for bringing parties together.

²⁴⁷ *Id.* at 301 (Individual evaluations "can adjust the duty to the circumstances of the case . . . The screening can at the same time be used to screen out cases in which even voluntary mediation may be undesirable.").

²⁴⁸ *Id.* at 294 (asserting that mandating mediation is justified only if there are barriers preventing the use of mediation in cases that would benefit from it, and if mandating mediation is the least intrusive measure of overcoming these barriers).

²⁴⁹ *Id.* at 296 (stating that "mandatory mediation may be the best way to break the impasse" in this situation).

²⁵⁰ SUSSKIND & CRUIKSHANK, *supra* note 24, at 137.

²⁵¹ *Id.* at 140.

²⁵² Nelle, *supra* note 244, at 295 ("Deficient communication can be both a substantive and a procedural obstacle to agreement . . . a duty to mediate can overcome this obstacle.").

²⁵³ See CARPENTER & KENNEDY, *supra* note 188, at 13.

²⁵⁴ See WOLPE & LEVINE, *supra* note 184, at 44.

²⁵⁵ See SCHNEIER & GROSS, *supra* note 16, at 300 (stating that advocacy groups "filter and process both information and policy preferences").

²⁵⁶ Bram, *supra* note 157, at 163 ("Congress' move . . . toward proactive involvement techniques is a positive sign.").

²⁵⁷ See *supra* Part II.

²⁵⁸ Nelle, *supra* note 244, at 295 ("[A]ttorneys will eschew mediation not just because of skepticism, but because of their self-interest, even where it conflicts with the

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Though potentially coercive in initiating the mediation, this mechanism is not problematic to the stakeholders, lobbyists, or the system. The stakeholders may be compelled to enter the mediation, but this in no way creates coercion in coming to an agreement.²⁵⁹ Mandatory mediation creates an illusion of loss of control, but parties retain their veto power over the proposals and their ability to walk away from an unacceptable situation.²⁶⁰ Also, because a subcommittee will choose disputes that are appropriate for mediation, the stakeholders will not be forced into a process that works against their interests.²⁶¹ The best argument against standard mandatory mediation programs is that they deny weaker parties the formal protection of litigation²⁶² and the legal vindication of their rights.²⁶³ However, interest group mediation does not remove protections of formal litigation, inherently involves interests rather than legal rights,²⁶⁴ and may lessen the effects of power imbalances.²⁶⁵ Finally, this process will not obstruct the normal

client's interests. This conflict of interest or 'agency problem' may be quite pervasive. The flipside of mediation's potential for reducing legal costs is a threat to lawyers' revenues." A similar danger is posed by lobbyists that are agents to stakeholders as lawyers are agents of disputants.).

²⁵⁹ Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273, 278 (2005) (quoting Frank Sander, "I believe there is a clear distinction between coercion into mediation and coercion in mediation."); see also Bingham, *supra* note 240, at 882–83 ("[S]cholars distinguish between self-determination as to process and as to the outcome of that process.").

²⁶⁰ SUSSKIND & CRUIKSHANK, *supra* note 24, at 138.

²⁶¹ Hedeem, *supra* note 259, at 278 ("[T]o say 'You have to try this process because in our judgment'—the legislature's or judge's judgment—'this may be a good case for attempted settlement,' that seems to me all right.") (quoting Frank Sander).

²⁶² Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. INT'L & COMP. L. 519, 550 (2005) (advocating "legislatures considering mandatory mediation laws to contemplate the unintended effects of diverting cases from litigation to mediation").

²⁶³ Nelle, *supra* note 244, at 293 ("The reason mediation is ineffective in these circumstances is that mediation does not emphasize rights (which might empower the weaker party) and has a tendency to preserve power imbalances.").

²⁶⁴ Mediation is "particularly well-suited for dealing with interest-centered controversies or for reorienting disputes towards reconciling interests." Nelle, *supra* note 244, at 292.

²⁶⁵ It does this by removing stakeholders from a system controlled by various sources of power (information, money, access) and focusing on interests. Also, public policy mediation can lessen the effects of power disparities by ensuring protective rules to the weaker parties and convincing more powerful parties of the disadvantages of nonparticipation. See SUSSKIND & CRUIKSHANK, *supra* note 24, at 144.

activities of lobbyists because the participants will be stakeholders.²⁶⁶ These participants will retain the services of their lobbyists, who remain entirely necessary for their ability to gather and facilitate information,²⁶⁷ but will not need the lobbyists to cajole legislators once agreement is reached among the affected interests in mediation.²⁶⁸ Therefore, mandatory mediation would not coerce stakeholders or interfere with standard lobbying activity.

To enforce the duty to mediate on the chosen interest groups, Congress must use visible, effective, yet proportionate sanctions for noncompliance.²⁶⁹ Groups that refuse to participate may have their lobbying expenditures restricted or suspended. The mediator may also report groups that act in bad faith to the House Rules Committee, which has the power to delay or expedite congressional consideration of proposals against the wishes of the bad faith participants.²⁷⁰ However, these sanctions may be largely unnecessary because initiation is the easier phase of the process,²⁷¹ and organizers can usually convince the stakeholders to participate voluntarily.²⁷² Thus, a subcommittee under the House Rules Committee can designate appropriate disputes for mediation and can effectively bring the stakeholders to the mediation without burdening affected interests.

B. *Enacting Agreements*

A mechanism must also be in place to enact the agreement into law. If the accord is directly enacted, Congress loses its "legislative sovereignty"²⁷³

²⁶⁶ Dunn, *supra* note 72 (voicing concern that mediation among interests would interfere with lobbyists' normal functions by creating a distracting, burdensome procedural requirement).

²⁶⁷ See WOLPE & LEVINE, *supra* note 184, at 44; see also SCHNEIER & GROSS, *supra* note 16, at 149.

²⁶⁸ See *infra* Part V.B (discussing the effects of the yes-or-no vote).

²⁶⁹ Nelle, *supra* note 244, at 305.

²⁷⁰ Bruff, *supra* note 234, at 220.

²⁷¹ SUSSKIND & CRUIKSHANK, *supra* note 24, at 137.

²⁷² *Id.* at 140 (stating that a convener can "spend a substantial amount of time meeting with potential stakeholders to convince them that a negotiated approach can work").

²⁷³ David E. Skaggs, *How Can Parliamentary Participation in WTO Rule-Making and Democratic Control be Made More Effective in the WTO?: A United States Congressional Perspective*, 7 J. INT'L ECON. L. 655, 656 (2004).

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to the special interests and cannot protect the public good.²⁷⁴ However, if Congress retains the right to amend the mediated agreement, then adversarial lobbying among the interest groups will reemerge,²⁷⁵ and parties, therefore, will have no reason to negotiate a consensus in the first place.²⁷⁶ The adoption procedure must ensure that the outcome that the parties decide remains intact without denying Congress the right to exercise discretion.

To balance these interests, the stakeholders will present their mediated agreements to Congress for a yes-or-no vote without amendment. The first benefit of this mechanism is that it preserves the credibility of the mediation process. Negotiating parties will not consent to agreements that may become less favorable with congressional tampering.²⁷⁷ Preserving the agreement, therefore, creates credibility²⁷⁸ and is indispensable to bringing the parties together²⁷⁹ and conducting the negotiation process.²⁸⁰ Furthermore, this mechanism preserves appropriate congressional oversight and discretion. As

²⁷⁴ See Cristin Kent, *Condemned if They Do, Condemned if They Don't: Eminent Domain, Public Use Abandonment, and the Need for Condemnee Protections*, 30 SEATTLE U. L. REV. 503, 507 (2007).

²⁷⁵ William J. Davey, *The WTO: Looking Forwards*, 9 J. INT'L ECON. L. 3, 7 n.17 (2006) (stating that unless it limits its powers, "Congress will be unable to restrain itself from amending key parts of the agreement").

²⁷⁶ Natalie R. Minter, Note, *Fast Track Procedures: Do They Infringe Upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL'Y 107, 109 (1995) (stating that parties whose agreements must be enacted by Congress "could not credibly negotiate in a situation where Congress could unravel a completed agreement by rejecting or amending any specific provision of it").

²⁷⁷ Wright, *supra* note 68, at 994 (stating that negotiating parties "must have credibility when negotiating" because conflicting interests will not commit to a process that "does not have the authority to enact the agreements").

²⁷⁸ *Id.* (describing the prohibition of amendments to agreements in fast track authority and how this mechanism "empower[s] the President to negotiate bilateral and multilateral trade agreements" because it "gives the President credibility at the international negotiating table").

²⁷⁹ *Id.* at 997 (describing the effectiveness of similar fast track authority and how "countries that had previously indicated an interest in negotiating . . . with the United States abandoned those plans after fast track expired" and how, once fast track was brought back, "those countries have again expressed a willingness to begin negotiations").

²⁸⁰ Clete D. Johnson, Note, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 GA. J. INT'L & COMP. L. 437, 439 (2004) (stating that in order to present an agreement for Congressional approval, "a yes-or-no vote, without the possibility of amendment . . . is indispensable for the completion of complex [negotiations]").

long as it retains the power to vote on the proposal, Congress may delegate the power to create the substance of legislation²⁸¹ and still preserve its proper role.²⁸² For example, denying amendments on negotiated agreements and seeking simple yes-or-no approval is a beneficial congressional practice under "fast track authority."²⁸³ This mechanism gives credibility to American negotiators in making trade deals²⁸⁴ and provides for efficient, expedient adoption of the agreement in the parties' interests²⁸⁵ within constitutional boundaries.²⁸⁶

Furthermore, this mechanism will reduce lobbying pressure. Because Congress has limited discretion in fast track diplomacy, there is much less of a reason to lobby legislators over these proposals.²⁸⁷ The lobbying pressure will be further reduced because both sides of the debate naturally support their agreement. Furthermore, this mechanism may have a moderating influence on the negotiated solution. Because the stakeholders know that the agreements they produce must pass congressional approval, they may create moderate, acceptable proposals to save their hard work from rejection.²⁸⁸ This means that opposing groups will avoid compromises that appease both extremes but repulse the general public. Requiring congressional approval while precluding amendments will therefore create acceptable policy and diminish lobbying pressure.

²⁸¹ Wright, *supra* note 68, at 998 (considering fast track trade authority, "the courts have recognized that Congress must be permitted to delegate some of its powers in order to be able to function").

²⁸² Minter, *supra* note 276, at 114 (stating that under the tested practice of fast track trade promotion authority, "Congress maintains its authority to work its will on legislation and its role in trade negotiations is safeguarded").

²⁸³ Johnson, *supra* note 280, at 439 (describing this mechanism as "an innovative constitutional device that allows the president to present to Congress a completed trade agreement for a yes-or-no vote, without the possibility of amendment").

²⁸⁴ Davey, *supra* note 275, at 7 (stating that "US negotiators will not be able to make credible commitments in the absence of trade promotion authority ('fast-track')").

²⁸⁵ Minter, *supra* note 276, at 108 (stating that "fast track is a legislative procedure designed to ensure expedient and efficient consideration of trade agreements").

²⁸⁶ *Id.* at 110 ("[I]f we look to the sections of the Constitution that define the powers of the legislative and the executive branches of government, we find that fast track procedures preserve Congress' role.").

²⁸⁷ Wright, *supra* note 68, at 996 ("The 'all or nothing' methodology of fast-track procedures reduces the pressure on representatives by special-interest groups.").

²⁸⁸ John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 193 (1993) (One "advantage of the representation filter is its moderating effect. In theory, at least, elected representatives have a duty to govern on behalf of all their constituents.").

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Thus, in adopting the outcomes of the stakeholder mediations, Congress should consider these agreements without amendment. Presenting unchanged mediated agreements for simple yes-or-no congressional approval provides credibility for negotiating participants, preserves the appropriate role and powers of Congress, and creates a moderating influence on the discussions. In conclusion, interest group mediation is an operationally feasible proposal. Implementing it would require a Mediation Subcommittee under the House Rules Committee and a voting mechanism that prohibits amendments on proposals negotiated by interest groups. These structures are not burdensome and are, therefore, entirely worth the potential benefits of this process.

VI. BROADER IMPLICATIONS

Apart from the specific problem of lobbying reform, the above proposal may have implications for the optimal use of lobbyists in Congress and even broader implications for the practice of democracy under modern conditions. Perhaps the lobbying boom is a symptom of a greater problem, and maybe consensus-based policymaking can create benefits outside of efficient lobbying practices.

A. Optimal Lobbying Practices in Congress

Though public attention focuses on the corruption with which it is associated, lobbying has many positive aspects. The facilitating effect of lobbying makes it necessary to the functioning of the congressional system and consensus-building among conflicting interests. Lobbying reform has failed to promote this function because it uses broad disclosure laws instead of targeting the problematic elements of lobbyist practices.²⁸⁹ However, interest group mediation allows for and promotes productive aspects of lobbying while decreasing corruption and inefficiency. Therefore, this proposal offers an organizational structure that is currently missing from the field of lobbying and may lead to optimal lobbying efforts.

Through their interaction with a diverse range of people in Washington, lobbyists have much to offer the system and its players in facilitating communication.²⁹⁰ Despite evidence of corruption and inefficiency in the

²⁸⁹ See *supra* Part II.C.

²⁹⁰ WOLPE & LEVINE, *supra* note 184, at 44 (stating that unlike the legislators who have little contact outside their party and committees, the lobbyist "has a more complete overview of the political landscape" and can see these things developing).

influence industry,²⁹¹ proponents of current lobbying practice argue that lobbying is a source of information rather than problems.²⁹² Clients benefit from lobbying activities such as monitoring congressional activity²⁹³ and providing members of Congress with information that supports their positions.²⁹⁴ However, the system as a whole also benefits because members of Congress receive digestible amounts of information from their supporters²⁹⁵ and reliable reconnaissance on the actions of opposing politicians and interest groups.²⁹⁶

Though they seem to mostly benefit the system, these actions directly serve the clients that fund them because of the following dynamic: Members of Congress are faced with an insurmountable amount of data and have little contact with fellow members.²⁹⁷ Because legislators do not communicate with most of their fellow members, they require updates on the actions of other players in order to give informed consent in voting for a proposal.²⁹⁸ To be persuasive, lobbyists must provide legislators with trustworthy information about the support and opposition they will face in taking the lobbyist's position. Thus, by gathering and distributing helpful information for members of Congress, lobbyists serve the interests of their clients. Furthermore, by gathering this information, lobbyists obtain a superior overview of the political landscape²⁹⁹ and use this advantage to serve as

²⁹¹ See *supra* Part II.B.

²⁹² Termini, *supra* note 42, at 1038 ("Lobbyists facilitate this information processing by providing pertinent facts, rather than persuasive threats. In this light, lobbying as an information transmission process may be a necessary lubricant to effective lawmaking.").

²⁹³ SCHNEIER & GROSS, *supra* note 16, at 149; see also Birnbaum, *supra* note 4.

²⁹⁴ Michael T. Heaney, *Brokering Health Policy: Coalitions, Parties, and Interest Group Influence*, 31 J. HEALTH POL'Y & L. 887, 898 (2006) ("For example, the Planned Parenthood Federation of America lobbies Congress by providing information about the health benefits and risks of contraceptive technologies.").

²⁹⁵ SCHNEIER & GROSS, *supra* note 16, at 300.

²⁹⁶ WOLPE & LEVINE, *supra* note 184, at 35–36; see also SCHNEIER & GROSS, *supra* note 16, at 310 (describing lobbyists as communications links among members of Congress).

²⁹⁷ WOLPE & LEVINE, *supra* note 184, at 44 (describing how members of Congress have very limited contact outside "their committees and particularly their party's colleagues on that committee").

²⁹⁸ *Id.* at 35–36; see also SCHNEIER & GROSS, *supra* note 16, at 292 (explaining how members of Congress rely on the advice of others in making most of their decisions and why this is a valid practice).

²⁹⁹ WOLPE & LEVINE, *supra* note 184, at 44.

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congressional go-betweens that organize the agenda³⁰⁰ and conduct political trades.³⁰¹ As a result, the role of lobbyists has expanded from being only informational links between legislators and their constituents³⁰² to being the internal conduits by which Congress conducts its business.³⁰³ Therefore, lobbyists are privately-provided agents that serve a necessary public function.

But what of the valid criticisms of lobbying as a corrupt, inefficient means of indirect influence? The reality is that both assertions are correct: lobbying is problematic as a means of indirect influence, but it also remains useful as a facilitator of information. The good news is that these functions are detachable under the proposed mechanism of interest group mediation. Lobbyists fully provide their normal information services, to the benefit of their clients and the system, but they will also delegate advocacy in appropriate circumstances to the stakeholders through a congressional mechanism of facilitated negotiation. Thus, clients and Congress will receive the quality and efficiency of consensual solutions without losing the facilitative function of lobbyists.

Additionally, interest group mediation will preserve negotiated agreements among conflicting interests. Though it does not receive much attention compared to corruption in the practice, lobbyists assert that a substantial amount of their work involves consensus-building.³⁰⁴ However, the lack of cooperative structures promoting these actions leaves the resulting deals hindered and vulnerable when they are introduced into the adversarial, congressional system. For example, after a lobbyist facilitates a compromise, their client often reneges on the agreement;³⁰⁵ or once a deal is pushed through one house, a politician in the other house will undercut or amend the bill.³⁰⁶ The influence of the adversarial deliberative system, therefore, works against the unstructured collaboration that lobbyists conduct. Interest group mediation seeks to fix this disorganized system by attaining commitment

³⁰⁰ SCHNEIER & GROSS, *supra* note 16, at 301.

³⁰¹ *Id.* at 310.

³⁰² *Id.* at 300.

³⁰³ *Id.* at 310.

³⁰⁴ Toman, *supra* note 97; Interview with Maggie Lewis, Associate Director, Ohio Commission on Dispute Resolution and Conflict Management, Columbus, Ohio (July 17, 2007); Charles F. Abernathy, *When Civil Rights Go Wrong: Agenda and Process in Civil Rights Reform*, 2 TEMP. POL. & CIV. RTS. L. REV. 177, 194 (1993) (describing the seriousness of one "issue for civil rights lobbyists because a great deal of their work involves education and consensus building").

³⁰⁵ Toman, *supra* note 97.

³⁰⁶ *Id.*

from interest groups and officially sanctioning and preserving the agreements that they produce. With this mechanism, lobbyists will delegate their consensus-building efforts to the parties to directly negotiate under a mediator. This practice may be more effective because the parties are directly involved in the negotiation and the agreements are better protected.

Therefore, this proposal may serve as an optimal structure for lobbying practices. The service that lobbyists offer centers on expertise in working through the government and relationships with these officials.³⁰⁷ Optimal use of their services would focus on the savvy that lobbyists have within the government.³⁰⁸ Lobbying becomes overextended and inefficient when the lobbyist's clients could do the same work without government-specialized advocates. By offering a secured structure for consensus-building, interest group mediation empowers the affected interests to perform their own negotiation and advocacy while retaining lobbyists to conduct the necessary facilitation with the government actors. Thus, using the particular expertise of lobbyists to supplement interest group interaction may encourage more efficient use of these services. Interest group mediation, therefore, promises to transform lobbying from a practice that dominates the system with secret deals and political compromises³⁰⁹ to a practice that only supplements the more empowered efforts of interest groups.

B. Increasing Deliberative Democracy in Congress

The analysis of consensus-based approaches to current problems in creating public policy touches upon more than the narrow issue of the lobbying boom. Increased lobbying pressures and the difficulty that legislatures currently experience with processing information may be symptomatic of a more inherent defect in the system, and the solution offered by collaborative policymaking may promise more than better lobbying practices. In fact, these methods may affect the very concept of democracy in modern congressional practice.

³⁰⁷ WOLPE & LEVINE, *supra* note 184, at 32 (stating that lobbyists are experts on the people and processes of lawmaking); Toman, *supra* note 97.

³⁰⁸ Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 783 (1982) (discussing an example of creating "functional efficiency by making the best use of expertise").

³⁰⁹ Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 470 (1999) ("[S]ecret deals between interest group lobbyists, particular legislators, and agency decisionmakers seem not to qualify as legitimate means of political influence.").

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A growing number of legal scholars are challenging the traditional model of democratically elected government as outdated and unfit for dealing with the complex, multiparty nature of modern public disputes.³¹⁰ Our forefathers designed our democratic structure under a mindset of dualism and binary patterns that relies on adversarial mechanisms such as courts, political parties, and two-sided debates.³¹¹ This simple structure fit a legislature composed of twenty-six Senators and sixty-five Representatives,³¹² all of whom were white landowning males.³¹³ Such a system was able to effectively address the less complex issues of the past with adversarial deliberations.³¹⁴ However, modern problems are becoming increasingly complicated,³¹⁵ involving many diverse parties and issues.³¹⁶ As congressional processes address more complicated issues from a wider range of voices, the debate and deliberation upon which the system depends lessens.³¹⁷ Under these constraints of time and information,³¹⁸ actual floor debate is useful only as a method to enter the speaker's opinion into the record, rather than a means to conduct a productive conversation or debate.³¹⁹ Basically, the United States Congress was not designed to deal

³¹⁰ Menkel-Meadow, *supra* note 69, at 347–48; *see also* MAYER, *supra* note 120, at 167–68.

³¹¹ Menkel-Meadow, *supra* note 69, at 347–48.

³¹² Dennis J. Tuchler, *Has Congress Abdicated its Legislative Authority to its Staff?*, 19 ST. LOUIS U. PUB. L. REV. 107, 114 n.23 (2000) ("[B]oth houses were small enough for one to imagine general thoughtful discussion of issues before them.").

³¹³ Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1228 n.145 (1984).

³¹⁴ Solomon & Wolfensberger, *supra* note 21, at 326 ("Put simply, the earlier Congresses had the luxury of discussing fewer and less complex issues than those facing Congress in the modern era.").

³¹⁵ *Id.* ("As America grew, the problems facing it became more complex, and the House's workload increased.").

³¹⁶ Menkel-Meadow, *supra* note 69, at 347–48.

³¹⁷ Solomon & Wolfensberger, *supra* note 21, at 321.

³¹⁸ Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1290 (2001) ("Despite the enormous growth of congressional staff and the refined specialization of its internal structure, Congress faces tight deliberative constraints of time and information.").

³¹⁹ Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) ("Structurally, both houses are large, making the process of engaging in complex arguments during a floor debate difficult. For the most part, the speeches made on the floor are designed to get a member's position on the record rather than to initiate a dialogue.").

with issues or parties that are as complicated as they are today.³²⁰ By continuing to use adversarial, two-sided forums, modern democratic policymakers respond to an overload of citizen input with inadequate processes and insufficient outcomes.³²¹ Efforts to adapt through changes in rules and procedures³²² are problematic because the traditional, adversarial structures cannot be bent to fit modern needs.³²³ The resulting problem is that, under the traditional structures, elected officials have difficulty representing diverse interests in complicated disputes³²⁴ and citizens have difficulty taking legislative action other than blocking proposals.³²⁵ This problem leads to a perception of democracy as a cumbersome, inefficient process.³²⁶

The solution to this problem is structured empowerment of constituents³²⁷ such as mediated public policymaking.³²⁸ This idea is the product of the vision of political theory and the tools of conflict resolution.³²⁹ The political theory of deliberative democracy attempts to address the above problems with representative democratic structures by considering ways to

³²⁰ Solomon & Wolfensberger, *supra* note 21, at 326 ("The deliberative process in the twentieth century House is a far cry from what it was in Jefferson's day."); Menkel-Meadow, *supra* note 69, at 347 ("[T]he empirical world has changed greatly from the times in which most of our legal and political institutions were conceptualized and created.").

³²¹ Menkel-Meadow, *supra* note 125, at 19 (section on "Institutional gridlock").

³²² Solomon & Wolfensberger, *supra* note 21, at 326 (stating that as the disputes became more complex and workload increased, "[t]he membership and structure of the House were forced to change accordingly").

³²³ *Id.* at 321–22 (1994) (discussing problems with Congress).

³²⁴ Menkel-Meadow, *supra* note 69, at 347–48 (arguing that binary, adversarial methods may not be able to handle modern, complicated disputes); *see also* Solomon & Wolfensberger, *supra* note 21, at 324 (discussing the decline in democratic deliberation and how "the diminution of this scrutiny has contributed to the erosion of public confidence in Congress").

³²⁵ *See* SUSSKIND & CRUIKSHANK, *supra* note 24, at 3–8.

³²⁶ MAYER, *supra* note 120, at 167.

³²⁷ Menkel-Meadow, *supra* note 69, at 348 ("These problems may require input from a multiplicity of constituencies and coordinated action by a multiplicity of legal and political institutions."); *see also* MAYER, *supra* note 120, at 167–68 ("Effective conflict resolution and collaborative problem-solving procedures can help this critical participatory element of democracy work.").

³²⁸ *See supra* Part V.

³²⁹ *See* Menkel-Meadow, *supra* note 125.

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directly involve and enhance input from the polity.³³⁰ Conflict resolution then provides the tools that are necessary to empower the parties to work through complex disputes and create consensual policy.³³¹ In particular, mediation presents a necessary tool in creating this level of democracy.³³² With its ability to bring opposing groups together and produce consensual policy, mediation demonstrates an "internal democracy" that has unbridled potential.³³³ The use of mediation may therefore improve the political process and restore faith in the government.³³⁴ In addressing the flaws of our representational system, conflict resolution can fix problems identified by theories of deliberative democracy. However, government actors must see these consensus processes as part of the system, working in tandem with adversarial mechanisms, instead of independent and unofficial measures that are used only as alternatives to traditional measures.³³⁵

The proposed system of interest group mediation synthesizes the conflict resolution tool of mediated policymaking in combination with the established

³³⁰ Hulet, *supra* note 194, at 27 ("In contrast to traditional political theories that emphasize voting for elected representatives, deliberative democrats claim that, to produce democratic outcomes, citizens should be involved directly in formulating public policy and even in lawmaking."); Menkel-Meadow, *supra* note 125, at 18 (describing the focus of deliberative democracy as "how to enhance reasoned argument and deliberation among members of the polity, principally in political decision-making").

³³¹ Menkel-Meadow, *supra* note 125, at 18 ("[T]he conflict-resolution movement has developed as an eclectic applied social science of both theory and practice, drawing from planning, law, sociology, psychology, communications and decision sciences to develop models of decision-making, dialogue and dispute settlement. Its process embodiments include the primary ADR processes of negotiation, mediation, arbitration and adjudication.").

³³² Weinstein, *supra* note 67, at 35 ("One of the skills needed to interact in a democracy is mediation that assists parties in resolving conflict while being respectful of each person's interests.").

³³³ Erbe, *supra* note 103, at 415 ("Mediation's internal democracy, or good governance, creates outcomes truly responsive to diverse needs at all levels of society through consensus-building. Mediation has potential to transform broader society, encouraging democracy through training citizens, impartially guiding power sharing, effectively bridging cultural difference, building durable relationships and sustainable solutions, and otherwise enhancing the parties' ability to work together efficiently and effectively through, for example, ensuring requisite transparency and accountability.").

³³⁴ SUSSKIND & CRUIKSHANK, *supra* note 24, at 13.

³³⁵ MAYER, *supra* note 120, at 62 ("[Consensus-building approaches] can play a useful role in promoting dialogue . . . But they need to be viewed as part of more traditional policymaking procedures, not as independent from them."); *see also* SUSSKIND & CRUIKSHANK, *supra* note 24, at 11 ("[Consensus-building] approaches must be treated as supplements—and not alternatives—to conventional decision making.").

structure of lobbying to create a process for better deliberative democracy in Congress. Interest group mediation creates issue-specific deliberative democracy by directly involving the interests that form around certain issues. Though the entire polity is not involved, the citizens that are affected by the policy are represented by the diverse interest groups that lobby Congress. And while some scholars attack consensus-based policymaking as forcing compromise and obstructing the normal functioning of the government,³³⁶ interest group mediation leaves legislatures and lobbyists unaffected by focusing on the stakeholder interests upstream. The result is a coherent system where affected stakeholders complement the efforts of Congresspeople and lobbyists under an established mechanism for cooperation. While consensus-based policymaking processes exist, they either obstruct normal operations or, more frequently, receive marginal and infrequent use.³³⁷ This proposal allows the consensus-based processes to complement the adversarial approaches used by legislatures and lobbyists.³³⁸ Interest group mediation therefore has the potential to enhance the democratic value of the system by combining the benefits of adversarial and cooperative modalities without the disadvantages associated with each.³³⁹ Thus, the proposed process has the potential to improve the democratic value of congressional policy through direct involvement of interest groups under a mediated framework.

Outside of the democratic value in our own system, Americans must also be aware of the effectiveness of these institutions as we attempt to export them internationally.³⁴⁰ Instead of relying only on adversarial deliberation and voting in the legislature, it might be possible to create permanent consensus-based structures within the legislature. Such a mechanism would

³³⁶ MAYER, *supra* note 120, at 63.

³³⁷ *Id.* at 62 (stating that while valued by participants, consensus building processes are time-consuming and "are seldom the core component of how public policy disputes are resolved").

³³⁸ Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN ST. L. REV. 349, 400 (2006) ("Consensus building avoids the adversarial process associated with traditional legislating and lobbying.").

³³⁹ Klare, *supra* note 121, at 77.

³⁴⁰ See Anne Stephens, Book Note, 43 STAN. J. INT'L L. 335 (reviewing PAUL D. CARRINGTON, *SPREADING AMERICA'S WORD: STORIES OF ITS LAWYER-MISSIONARIES* (2005)).

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bring conflict resolution into the fold of normal government functions³⁴¹ and allow for different modalities of expression³⁴² on the way to creating widely acceptable solutions.³⁴³ One possibility is a bicameral legislature with a large, adversarial lower house with majority-based decisions and a smaller, consensus-based upper house. The upper house would hold mediated discussions among representatives of specific interests.³⁴⁴ Checks and balances between these two houses may create harmony between majority control and minority accommodation.³⁴⁵ Also, the deliberation that is absent from the lower house, because of constraints created by the complexities of modern society,³⁴⁶ is fully possible among the fewer, upper house legislators that are each clearly affiliated with certain interests. This system may therefore fit modern conditions and make full use of conflict resolution policymaking tools. One candidate for this system, and a good example of how this structure may be helpful, is the emerging Iraqi democracy. The Iraqi government is torn by sharply-divided, combative factions,³⁴⁷ and therefore

³⁴¹ MAYER, *supra* note 120, at 62 (stating that conflict resolution methods "need to be viewed as part of more traditional policymaking procedures, not as independent from them"); *see also* SUSSKIND & CRUIKSHANK, *supra* note 24, at 11.

³⁴² Carrie Menkel-Meadow, Lecture, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 571 (2006) (summarizing the work of Jon Elster on different motivations behind decisionmaking and how government structures cater to them, and then concluding that "we can choose to use different modalities of expression in different stages of decisionmaking to achieve different ends").

³⁴³ *Id.* at 573–74 ("[C]onsensus building allows a group to reach the best agreement it can find, not just one that is barely acceptable to a majority.") (quoting Lawrence Susskind).

³⁴⁴ Pub. Int'l Law & Policy Group and The Century Found., *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53, 83 (2004) ("Second chambers may be allocated a wide variety of responsibilities and rights in order to protect the diverse interests of a state."). Thus, the second chamber could be designed to represent the interests of the constituent units.

³⁴⁵ Menkel-Meadow, *supra* note 342, at 569 (citing to James Madison in the Federalist Papers that discuss the "need for 'checks and balances' of different kinds of processes and different sources of power, argument, and modalities of decisionmaking to prevent the control and domination of either a dominant majority or the unruliness of factions").

³⁴⁶ Garrett & Vermeule, *supra* note 318, at 1290 ("Congress faces tight deliberative constraints of time and information."); *see also* Solomon & Wolfensberger, *supra* note 21, at 326 ("[T]he earlier Congresses had the luxury of discussing fewer and less complex issues than those facing Congress in the modern era.").

³⁴⁷ David Little, *Religion, Conflict and Peace*, 38 CASE W. RES. J. INT'L L. 95, 101–02 (2006) ("Among other problems are the existence of high-energy politics, a weak

needs government structures that effectively address a diverse array of interests.³⁴⁸ A mediated, consensus-based upper house may better bring factions to the table and ameliorate the power struggle that is at the heart of Iraqi instability.³⁴⁹ In fact, Iraq may be able to implement this structure under its current constitution, which establishes an adversarial lower house, but allows for the creation of an upper house that will operate under an unspecified process that will be determined by law.³⁵⁰ Thus, opportunities exist for consensus-based approaches to be better institutionalized in order to develop legislative systems that fit modern society, especially in emerging democracies.

C. Transformational Politics and the Societal Effects of Consensus-Based Public Policymaking

While interest group mediation may improve democratic values in Congress, greater use of consensual methods of government may have broader implications for society. The Transformational Politics movement envisions the widespread use of consensual methods in governmental structures and the effects this may have on society. Transformational Politics is a slightly amorphous,³⁵¹ multifaceted umbrella-concept³⁵² for many new,

central government, sharply-divided, combative, and well-organized political parties, and the absence of stable national and civic institutions.").

³⁴⁸ Pub. Int'l Law & Policy Group and The Century Found., *supra* note 344, at 61 ("[S]tability must be ensured through the integrity of the institutions . . . [so] the need to design institutions that can adequately represent the varied Iraqi interests without leading to political gridlock will be paramount.").

³⁴⁹ Noah Feldman, Vali Nasr, James Fearon, & Juan Cole, *Power Struggle, Tribal Conflict or Religious War?*, TIME, Feb. 26, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1167736,00.html> (last visited Mar. 5, 2008) ("[T]he only way out of the violence is for Iraqis to realize that they have more to gain by negotiating a settlement between their groups than they do by allowing a full-blown brothers' war to break out. What lies at the heart of the sectarian violence in Iraq is not so much religious dispute as it is a very secular competition for power and prominence in the new Iraq.").

³⁵⁰ IRAQ CONSTITUTION § 3, ch. 1, art. 59, 64.

³⁵¹ Christa Daryl Slaton, Stephen Woolpert, & Edward W. Schwerin, *Introduction: What Is Transformational Politics?*, in TRANSFORMATIONAL POLITICS: THEORY, STUDY, AND PRACTICE (Stephen Woolpert et al. eds., 1998).

³⁵² Slaton, *supra* note 80, at 5 (stating that "transformational politics is a web of theories").

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innovative ideas on changing³⁵³ the basic structures and goals of government.³⁵⁴ This school of thought cuts against traditional, adversarial³⁵⁵ structures of governmental dispute resolution as a problematic "battle for leverage"³⁵⁶ that caters exclusively to the side that exerts the most pressure.³⁵⁷ Transformational Politics focuses on conflict resolution³⁵⁸ and acknowledges that collaboration is a superior method of human interaction.³⁵⁹

Transformational Political thinkers would advocate that consensus-building methods become ingrained in the practices and norms of existing government institutions.³⁶⁰ In practicing politics based on participation³⁶¹ and healing,³⁶² conflicting groups would learn to acknowledge differences and avoid oversimplifications such as "us against them" and "right versus wrong."³⁶³ This change in governmental practices even has the potential to create tolerance and collaboration across the entire country³⁶⁴ because the current centralization of government and the media makes a top-down transformation of values more possible.³⁶⁵ Consensus-based actions among leaders may result in amicable conduct among constituents. Therefore, as a method of dealing with national issues and as a model of behavior for supporters of these interests, institutional mediation may effectuate broad social change.³⁶⁶

³⁵³ EDWARD W. SCHWERIN, *MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS* 3 (1995) (describing Transformational Politics as "committed to examining alternatives").

³⁵⁴ Slaton, Woolpert, & Schwerin, *supra* note 351.

³⁵⁵ Slaton, *supra* note 80, at 13.

³⁵⁶ Tom Atlee, *Transformational Politics* (1991, revised Sept. 1999), http://www.co-intelligence.org/CIPol_TransformPol2.html (last visited Mar. 5, 2008).

³⁵⁷ *Id.* ("Bits of cooperative activity creep in—like alliances, compromises, political deals, protocols—if only to prevent the whole thing from tearing itself apart.").

³⁵⁸ SCHWERIN, *supra* note 353, at 6.

³⁵⁹ *Id.* at 5 (quoting Becker and Slaton).

³⁶⁰ See Michael S. Cummings, *Transforming Public Policy: Beyond Affirmative Action*, in *TRANSFORMATIONAL POLITICS: THEORY, STUDY, AND PRACTICE* 229 (Stephen Woolpert et al. eds., 1998).

³⁶¹ SCHWERIN, *supra* note 353, at 3.

³⁶² *Id.* at 4.

³⁶³ *Id.*

³⁶⁴ Slaton, Woolpert, & Schwerin, *supra* note 351.

³⁶⁵ Cummings, *supra* note 360, at 229.

³⁶⁶ CLOKE, *supra* note 84, at 276.

Thus, beyond creating more creative, widely acceptable policy, cooperative behavior among conflicting interests may lead the constituents of these interest groups to accept the differences in basic values of constituents of opposing interests and view society as more cooperative and peaceful. Transformational Politics predicts that the greater use of consensual methods of governance, such as interest group mediation, will create widespread civility and social change.

VII. CONCLUSION

This paper traces two themes. First, the theme of the problem involves governmental structures dealing with an increasingly complex society. This leads to overburdening pressure from petitioning interests, policies that have difficulty adapting to various and changing situations, processes that do not address different interests adequately, and groups seeking any means of power over the process, including obstruction. The second theme is that of the solution and it searches for methods to improve governmental processes in tackling the above problem. Lobbyists would seem to argue that lobbying has developed as the mechanism that aids Congress in dealing with overwhelming amounts of information from interest groups and fellow politicians. Conflict resolution theorists would counter that lobbying is inefficient and that the better solution is direct citizen participation under mediation.

The process of interest group mediation draws upon both lobbying and conflict resolution mechanisms. It uses the established organization provided by the interest group structure in order to represent interests. It then applies innovative techniques in conflict resolution to facilitate the optimal use of these groups. By allowing consensus-building efforts to supplement conventional policymaking, this mechanism has the potential to make the legislature become more efficient, responsive, and productive. Mediation's value in public policymaking shows that it can be more than just an alternative to the court system,³⁶⁷ but also an "alternative model of power"³⁶⁸ to traditional, adversarial governance. A system that uses a consensus-based

³⁶⁷ Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 879 (1997) ("There are features of mediation that make it particularly attractive beyond simply being an informal alternative to the formal courts.").

³⁶⁸ GEORGE C. PAVLICH, JUSTICE FRAGMENTED: MEDIATING COMMUNITY DISPUTES UNDER POSTMODERN CONDITIONS 149–50 (1996).

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model of power alongside traditional power structures will address a wide range of interests to better serve modern conditions.

